SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Record from Court of Claims	1	1
Petition	1	1
Exhibit "A"—Application for re-opening	25	17
Exhibit "B"—Claim for abatement	27	18
Affidavit of Ernest M. Bull	29	19
Exhibit 1—Additions to schedule "D"	37	25
2—Recomputation of accrued interest	38	26
3—Recomputation of accrued interest	38	26
4—Items to be deducted from schedule "B"	40	27
5—Additions to schedule "H"	42	28
6—Additions to schedule "I"	43	29
"A"—Declaration of trust	45	30
Schedule "B"—Decree of Union County Orphans' Court	46	30
Exhibit "C"—Letter from Commissioner, August 9, 1929	49	32

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 19, 1935.

—5873-C

	Original	Print
Exhibit "D"—Letter from Commissioner	51	33
Exhibit "E"—Petition to reopen, etc.	58	37
Exhibit "F"—Additional affidavit	65	42
Schedules 1 to 20, inc.—Receipts for bequests and bills, etc.	72	47
Schedules 21 to 23, inc.—Correspondence	92	55
Schedule 24—Receipted bill	99	59
Schedule 25—Release of A. H. Bull Steamship Co.	100	59
Exhibit "G"—Claim for refund	103	61
Affidavit of Ernest M. Bull	105	62
Schedule 26—Deductions claimed	111	67
Exhibit "H"—Claim for refund	112	67
Affidavit of Ernest M. Bull	114	69
Exhibit 1—Condensed balance sheet of A. H. Bull Steamship Co., 1913 to 1920, inc.	122	74
Exhibit 2—Deductions claimed	123	75
Exhibit "I"—Letter from Commissioner	124	75
Exhibit "K"—Claim for refund	127	77
Exhibit "L"—List of certain bequests, etc.	131	79
Exhibit "M"—Letter from Commissioner	133	81
General traverse	135	82
Change of attorneys	135	82
Argument and submission of case	135	82
Special findings of fact	137	83
Conclusion of law	139	86
Opinion of the court, Littleton, J.	139	87
Judgment	142	89
Proceedings after entry of judgment	142	90
Clerk's certificate (omitted in printing)	143	

[fol. 1]

IN THE COURT OF CLAIMS

No. L-383

ERNEST M. BULL, Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased,

against

UNITED STATES

I. PETITION—Filed September 16, 1930

To the Honorable the Chief Justice and the Judges of the Court of Claims:

The petitioner, Ernest M. Bull, sole surviving executor and trustee of the estate of Archibald H. Bull, deceased respectfully represents:

1. That Archibald H. Bull, a citizen and resident of Union County, New Jersey, died February 13, 1920, leaving a will in which he nominated his widow, Evelyn P. Bull, now deceased, and this petitioner, Ernest M. Bull, as his executors and trustees of his estate; that such will was duly probated in the Orphans' Court of Union County, New Jersey, and the executors named in the will were duly appointed executors by the Court and administered the estate under the direction of the Court; that on or about April 3, 1927, in the January term, 1927, of said Orphans' Court the final accounting and report of the executors was duly approved and the executors were directed to turn over to themselves, [fol. 2] as trustees under the will, all of the balance of the moneys and property of the estate remaining in their hands to be administered by them as such trustees according to the terms of the said will; and that all of said moneys and property were accordingly so turned over to and received by them, the said Evelyn P. Bull and Ernest M. Bull (this petitioner) as such trustees under the will.

That afterwards, on or about July 22, 1927, Evelyn P. Bull died, leaving this petitioner, Ernest M. Bull, as sole surviving trustee, and that, in accordance with the terms of the will of Archibald H. Bull, deceased, this petitioner

has since the death of Evelyn P. Bull, acted as sole trustee under the will of Archibald H. Bull, deceased, and is still so acting.

2. That Archibald H. Bull, deceased, was in his lifetime a member of a partnership carrying on business under the firm name of A. H. Bull and Company, ship agents and brokers. That said partnership had formerly been established and been carried on under formal written articles of co-partnership, dated January 9, 1918, which created a partnership to begin as of the first day of January, 1918, and to "continue one year from date". That said written articles of co-partnership expired by their terms either on January 1st, 1918, or else on January 9, 1919; and that one of the partners therein named, to wit: William H. R. Killeen, afterwards died prior to the death of said Archibald H. Bull; and that after the expiration of said written articles of co-partnership, the partnership was, nevertheless, by mutual consent of the partners, continued, and after the death of said William H. R. Killeen was reorganized [fol. 3] and carried on by the surviving partners, including said Archibald H. Bull, without further written agreement, but by mutual consent and agreement in accordance with the terms provided in said former written articles of co-partnership; and that, amongst the terms contained in said formal written articles, and in accordance with which the said co-partnership was so being carried on by mutual consent of the then surviving partners and existed at the time of the death of said Archibald H. Bull, was the following provision:

"That in the event of the death of any one of the said co-partners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the Estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as — the date of such withdrawal."

That in accordance with such provision, the business of the said partnership of A. H. Bull and Company was in fact continued after the death of said Archibald H. Bull, by the surviving partners until the end of the calendar year of 1920, the year in which said Archibald H. Bull died; and that during the period of time from and after February 13, 1920, up to and until December 31, 1920, inclusive, that is [fol. 4] to say, during the period of the balance of the calendar year within which Archibald H. Bull died, such business of the firm, A. H. Bull and Company, so carried on by such surviving partners, earned profits out of which such surviving partners afterwards paid over the sums of $200,117.09, and $12,601.70, aggregating the amount of $212,718.79, to the executors and trustees of the estate of Archibald H. Bull, deceased, as the portion of the profits of said partnership payable to the estate of such partner under the provisions of said partnership agreement above mentioned and set forth.

That such first amount of $200,117.09 was so paid to such executors and trustees prior to the date on which they filed their income tax return with the United States Internal Revenue Commissioner for income of the estate for the calendar year of 1920; that said second item above mentioned, of $12,601.70, was so paid to the executors and trustees after such income tax return for income for said calendar year of 1920 had been filed with the United States Internal Revenue Commissioner.

3. That said executors and trustees in preparing and filing with the Internal Revenue Commissioner the income tax return for income received by the estate of Archibald H. Bull, deceased, during the calendar year of 1920, that is to say, for the period from the date of the death of said decedent, February 13, 1920, to the end of that calendar year, December 31, 1920, and without consulting legal counsel, included in such return as income for the estate during such period said sum of $200,117.09, so received by such executors and trustees from such surviving partners of the partnership of A. H. Bull and Company, and did not include [fol. 5] such sum as corpus of the estate in the return made by them of the corpus of the estate for inheritance tax purposes.

4. That thereafter the Commissioner of Internal Revenue, after an investigation, determined that such sums of

money so received by said executors and trustees from such surviving partners aggregating, as aforesaid, the sum of $212,718.79 (including both the said items of $200,117.09 so received by the executors and trustees before making their income tax return of income of the estate for the year of 1920 and also the further said sum of $12,601.70 so received by the executors and trustees after making such income tax return for that year) constituted a part of the corpus of the estate of Archibald H. Bull, deceased, and were not income of the estate for the period after his death, and further that such aggregate sum of $212,718.79, as aforesaid, should have been reported and was to be treated as corpus of the estate for the purpose of the Federal estate taxes, and should not have been included in the income tax return for the purpose of the income tax. That in accordance with such ruling of the Commissioner, the two taxes, viz., the Federal estate tax and the income tax, for such calendar year of 1920, were settled and paid on that basis—that is to say, on such basis of the Commissioner's ruling that such amount so received by the executors from the surviving partners of the partnership of A. H. Bull and Company, under such above mentioned provisions in said partnership agreement, constituted a part of the corpus of the estate of the decedent and did not constitute income accruing to his estate after his death, and that accordingly said executors and trustees paid the Fed-
[fol. 6] eral estate tax on that basis, that is to say, paid the Federal estate tax assessed on the basis of including such sum of $212,718.79 as a part of the corpus of the decedent's estate; and that said Federal estate tax was so paid in two installments as follows: On June 17, 1921, $250,000.00, and on August 10, 1921, $86,264.66, total estate tax, $336,264.66. (Said estate tax was afterwards determined to have been overpaid because of other items relating to the estate of the decedent in no way connected with any of the matters here in question. Because of such other matters the amount of such estate tax was finally determined to be $312,127.17 and the difference between such amount and the amount of $336,264.66, so paid as aforesaid, was refunded to the executors and trustees. But, as aforesaid, that refund was not made because of anything connected with any of the matters here in question.)

5. That several years afterwards, on or about July 10, 1925, the Commissioner of Internal Revenue reversed such

former ruling; and, by his letter of said last mentioned date to the said executors and trustees, the Commissioner determined a "deficiency" of $261,212.55, in the amount of the income taxes which had theretofore been assessed upon the income which accrued to the estate of Archibald H. Bull after his death; and that in so determining said deficiency the Commissioner, in reversal, as aforesaid, of his former ruling, ruled that such sums so received by the executors and trustees from the surviving partners of the firm of A. H. Bull and Company, as aforesaid, constituted legally, and were to be treated and considered for the purposes of [fol. 7] assessing and collecting the income tax, as "income" to the estate of Archibald H. Bull, deceased, after his death.

6. That afterwards, on or about September 5, 1925, and before the enactment of the Revenue Act of 1926, such executors and trustees duly appealed from said ruling of said Commissioner so determining such deficiency to the Board of Tax Appeals; that a hearing was had; and that afterwards, on or about August 8, 1927, the Board of Tax Appeals promulgated its decision (officially reported in Volume 7, Board of Tax Appeals Reports, page 993, Docket No. 6888) wherein it modified such deficiency determination of the Commissioner, but upheld—and, as this petitioner respectfully submits, mistakenly, wrongfully and illegally upheld—such ruling of the Commissioner in so far as it held (in reversal of his former ruling in reliance whereon the Federal estate tax had been paid) that such sums so received by the executors and trustees from the surviving parthers of the firm of A. H. Bull and Company, under the provisions of the partnership agreement hereinbefore mentioned and set forth, constituted income accruing to the estate of said deceased Archibald H. Bull after his death, upon which income taxes should be levied against the estate as for income received by it during the period from February 13, 1920, to December 31, 1920 (that is, during the balance of the calendar year from the date of the death of Archibald H. Bull until the end of that year.)

7. That afterwards, on or about April 9, 1928, the Commissioner of Internal Revenue formally acquiesced in such decision of the Board of Tax Appeals of August 8, 1927, [fol. 8] aforesaid, and "pursuant" thereto determined,

anew, a "deficiency" of $55,166.49 of income tax alleged to be due to the United States from the estate of Archibald H. Bull, deceased, on account of such sums of money so received by such executors and trustees, as aforesaid, from the surviving partners of the partnership of A. H. Bull and Company. That afterwards, on or about June 14, 1928, this petitioner as sole surviving executor and trustee of the estate of Archibald H. Bull, deceased, paid to the Collector of Internal Revenue the amount of such "deficiency", $55,166.49, so determined by the Commissioner, as aforesaid, together with interest and penalties thereon, the amount of such payment aggregating $62,677.44, and that afterwards, on or about July 11, 1928, this petitioner, as such sole surviving executor and trustee, duly filed with said Commissioner his claim for refund of said last mentioned sum of $62,677.44. A copy thereof is Exhibit "K" hereto. That on or about April 9, 1929, an oral hearing was duly had upon such claim for refund, and that afterwards, on or about April 24, 1929, said claim for refund was duly denied by the Commissioner of Internal Revenue; and that on or about August 9, 1929, the Commissioner of Internal Revenue denied a rehearing or reconsideration of such claim for refund, and finally rejected the claim, as appears from a copy of the letter of the Commissioner to Mr. Alfred C. Frodel, attorney for this petitioner, dated August 9, 1929, copy whereof is hereto attached, marked Exhibit "C", and made a part of this petition with the same effect as though it had been herein copied and set forth at length.

8. That said Commissioner of Internal Revenue in so, on or about July 10, 1925 reversing his former ruling, as afore- [fol. 9] said, and the Board of Tax Appeals in so affirming such ruling of the Commissioner in reversing the Commissioner's first ruling, and in holding such sums so received by the executors and trustees from the surviving partners of A. H. Bull and Company under the provisions of the partnership agreement hereinbefore mentioned and set forth, to be income accruing to the estate of said decedent, Archibald H. Bull, after his death, upon which income taxes should be levied against the estate, and also the Commissioner of Internal Revenue in so acquiescing in such decision of the Board of Tax Appeals, and in so assessing thereon, anew, such "deficiency", on or about April 9, 1928, and in requiring this petitioner as sole surviving executor

and trustee of the estate of Archibald H. Bull, deceased, so to pay such "deficiency", and also in thereafter denying such petition of this petitioner for a refund, and in denying, on or about August 9, 1929, a rehearing or reconsideration of such claim for refund, and in so, then, finally rejecting the claim, were each and all in error, and that, as this petitioner respectfully submits, such sums so received by the executors and trustees of the estate of Archibald H. Bull, deceased, from the surviving partners of the firm of A. H. Bull and Company under the provisions of such partnership agreement after the death of Archibald H. Bull, were really, in fact and in law, part of the corpus of the estate of such decedent, as was originally held by the Commissioner of Internal Revenue, as hereinbefore stated and set forth, and were not income of the estate, and that, accordingly, the taxes payable by the estate, both the estate taxes and income taxes, were properly settled and paid in 1921 upon the basis of the Commissioner's ruling at that time, and that, therefore, the amount of the supposed "de-
[fol. 10] ficiency" in income taxes determined by the Commissioner, as aforesaid on or about April 9, 1928, pursuant to such ruling of the Board of Tax Appeals, and said payment made by this petitioner pursuant thereto, of the amount of such "deficiency", together with interest and penalties, in the amount of $62,677.44, paid by this petitioner, as aforesaid, on June 14, 1928, was improperly and erroneously assessed and required to be paid by this petitioner, and should be refunded to him by the United States.

9. That furthermore, in case it should be found and determined by this Honorable Court, to the contrary of the belief and contentions of this petitioner, that said sums so received by such executors and trustees after the death of said decedent, Archibald H. Bull, from such surviving partners of such former partnership of A. H. Bull and Company under such provisions aforementioned in the partnership agreement of the firm in existence at and prior to the death of Archibald H. Bull, are really to be considered as income accruing after the decedent's death to this estate, as now ruled by the Commissioner of Internal Revenue and held by the Board of Tax Appeals, and not part of the corpus of the estate as originally held by the Commissioner of Internal Revenue, as aforesaid, and that, therefore, such "deficiency" in income taxes paid by the estate was prop-

erly determined by the Commissioner of Internal Revenue on or about April 9, 1928, as aforesaid, to be paid; then in that case, this petitioner respectfully alleges that the Commissioner of Internal Revenue should thereupon on that date, to wit: April 9, 1928, have simultaneously found and ruled [fol. 11] and determined that so much of the estate taxes so paid as aforesaid on June 17, 1921 and August 10, 1921 ($250,000.00 on June 17, 1921, and $86,264.66 on August 10, 1921, as aforesaid), as represented the taxes upon the amount by which the corpus of the estate was increased by including therein such sums aggregating $212,718.79 so received, as aforesaid, by the executors and trustees after the death of said decedent from the surviving partners of the firm of A. H. Bull and Company (to wit: $34,035.00 of the taxes so paid as estate taxes, being sixteen per cent of said sum of $212,718.79), was improperly and illegally collected and paid to the United States as estate taxes upon the estate of said decedent, but should have been collected and treated when it was so paid as money paid on account of the income taxes upon such income of the estate so received from such surviving partners of the firm of A. H. Bull and Company, and, upon making such determination, the Commissioner of Internal Revenue should thereupon have credited such sum of $34,035.00, so paid to the United States in 1921, together with interest thereon at the rate of six per cent per annum from the date it was so paid, August 10, 1921, against the "deficiency" so determined by him on or about April 9, 1928, and should, therefore, have determined a net "deficiency" of income taxes of only $7,523.16 (that is to say, $55,166.49 less $47,643.33; being such "deficiency" of $55,166.49 less such above mentioned sum of $34.035.00 with interest calculated thereon at six per cent per annum from August 10, 1921 to April 9, 1928); and should have collected only such latter sum of $7,523.16, instead of the said sum of $62,677.44 actually collected and paid by this petitioner on or about July 11, 1928, as aforesaid; and that, there-
[fol. 12] fore, even if—(to the contrary of the belief and contentions of this petitioner)—such sums of money so received by the executors and trustees of the estate from the surviving partners of the firm of A. H. Bull and Company after the death of the decedent, Archibald H. Bull, were really to be treated as income accruing to the estate after the death of the decedent, and not as a part of the

corpus of the estate, nevertheless, the Commissioner of Internal Revenue should have allowed this petitioner's claim for refund against said payment so made by petitioner on June 14, 1928, to the extent of $47,643.33, together with interest thereon from April 9, 1928, the date of the determination of such "deficiency"; and that such last mentioned sum and interest still remains due from the United States to this petitioner as sole surviving executor and trustee of the estate of Archibald H. Bull, deceased.

That afterwards, on or about January 30, 1929, this petitioner accordingly filed with said Commissioner of Internal Revenue an application for the reopening of both the estate tax return and the income tax return of said estate, covering the period of 1920, under Treasury Decision 4235, on the grounds

"that the Government should make compensating adjustments in both of these cases when the issues involved have been finally considered and determined";

and therein requested

"that a conference be granted in order that these questions may be discussed with the representatives of both the Income Tax and Estate Tax Divisions."

[fol. 13] A copy of said last mentioned application is hereto attached marked Exhibit "A," and made a part hereof. Nevertheless the Commissioner afterwards, by his letter dated August 20, 1929, refused such application, and refused to reopen either the estate tax or the income tax for said estate, and finally rejected such application.

10. And, for a further and separate claim against the United States, this petitioner as sole surviving executor and trustee, as aforesaid, of the estate of Archibald H. Bull, deceased, further shows to the court that amongst other things the will of the said Archibald H. Bull provided certain bequests and legacies for charitable purposes, a list whereof as stated in the said will is hereto appended, marked Exhibit "L," and made a part of this petition with the same effect as though it had been herein copied and set forth at length; that with reference to such bequests, the Ninth paragraph of such will contained the following provisions:

"Ninth. Subject to the life interest thereon of my said wife, Evelyn P. Bull, I give and bequeath the following sums of money to the following charitable organizations and institutions, provided the appraised value of my estate at the time of my death, after the payment of all inheritance taxes, both State and Federal, shall amount to at least $1,000,000.00:

(Here follows in the will the list of bequests or legacies as set forth in Exhibit "L" hereto.)

"In case the appraised value of my estate at the time of my death, after the payment of all inheritance taxes, both State and Federal, shall amount to at least $2,000,-[fol. 14] 000.00, then, and in such case, I give and bequeath to each of the charitable organizations and institutions named in this Ninth paragraph of my will, double the amount named to each."

That, at the times when the executors and trustees made the original return of the estate for the purpose of estate taxes and when they paid the estate taxes in June and August, 1921, as hereinbefore stated, the said Evelyn P. Bull, widow of the decedent, Archibald H. Bull, was living and was one of the executors and trustees, and that it was at that time still uncertain whether or not the amount of such bequests or legacies for charitable purposes so to be paid under such provisions of the will only after the death of Evelyn P. Bull would be payable in the amount therein listed, as they appear in the list copied from the will in Exhibit "L," attached hereto, or would be payable in double the amounts named to each under the final clause of said paragraph Ninth of the will, as hereinbefore quoted, in case the estate should amount, after the payment of all inheritance taxes, both State and Federal, to at least $2,-000,000.00; that, accordingly, in so making said estate returns for the purpose of estate taxes, such executors and trustees claimed a deduction from the amount of the taxes upon which estate taxes should be levied only in the amount of the face of said bequests and legacies, and reserved the right to claim a further deduction in case the amount thereof should afterwards be doubled in accordance with such provisions of the will, and, that, accordingly the estate taxes were finally settled by the Commissioner, on

that basis, May 27, 1924. That, afterwards, Evelyn P. Bull, the widow of Archibald H. Bull, died on or about [fol. 15] July 22, 1927, as above stated, and that, after her death, it was found that the appraised value of the estate of Archibald H. Bull, deceased, at the time of his death, after the payment of all inheritance taxes, both State and Federal, amounted to more than $2,000,000.00, and, accordingly, this petitioner as sole surviving executor and trustee of the estate of Archibald H. Bull, deceased, thereafter paid to each of the charitable organizations and institutions named in the said Ninth paragraph of the said will, as listed therein and copied in Exhibit "L" hereto, double the amount of the bequests or legacies named to each, and that such payments in such doubled amounts aggregated $264,000.00; (that is to say, aggregated the sum of $127,914.54 more than the amount of the deduction from the estate allowed on account of the charitable legacies or bequests by the Commissioner of Internal Revenue by his letter of May 27, 1924, copy whereof is hereto attached, marked Exhibit "D," and made a part of this petition.

11. That following the filing of the return for Federal Estate Taxes, the executors and trustees filed a claim for abatement, verified August 10, 1921, and afterwards filed a claim for refund, verified October 6, 1922. And that afterwards, after the receipt of said letter from the Commissioner, dated May 27, 1924, Exhibit "D" hereto, as aforesaid (in which letter charitable, public and similar bequests were allowed as deductions from the taxable estate to the amount of $136,085.46), and after the death of said Evelyn P. Bull, and after the payment of said charitable bequests listed in said Ninth paragraph of said will and copied in Exhibit "L" hereto, in the aggregate doubled amount of [fol. 16] $264,000, as aforesaid, this petitioner as sole surviving executor and trustee duly filed with the said Commissioner of Internal Revenue on or about November 18, 1927, his formal "Petition to Reopen Prior Claim for Refund," copy whereof is hereunto annexed marked Exhibit "E," and made a part of this petition, whereby, amongst other things, this petitioner formally claimed (in numbered paragraph "1" thereof, and in the "summary" thereof), a "refund for additional payments on charitable bequests," a refund of such proportionate amount of the estate tax theretofore paid, as aforesaid, as corresponded to a reduc-

tion of the taxable estate in the sum of $127,914.54, as aforesaid. (That as appears from said "summary" in said "Petition to Reopen Prior Claim for Refund," Exhibit "E" hereto, a total refund of $69,534.40 was therein claimed, based in part upon a claim to a deduction from the taxable estate of said amount of $127,914.54 for "charitable bequests.")

And that petitioner thereafter, on or about February 16, 1928, filed his "Additional Affidavit," (Exhibit "F" hereto), in support of said "Petition to Reopen Prior Claim for Refund," and also, on or about April 13, 1928, filed with the Commissioner his formal claim for refund of taxes illegally collected (Exhibit "G" hereto), and likewise again included both in such last mentioned "Additional Affidavit" and also in said formal claim for refund, a claim for refund of such amount of the estate tax so paid as corresponded to a deduction of said sum of $127,914.54 from the amount of the taxable estate.

12. That said "Petition to Reopen Prior Claim for Refund" and said formal claim for refund, were afterwards, [fol. 17] by letter of said Commissioner, dated June 30, 1928, rejected and refused; and that afterwards, the Commissioner, by his letter dated August 20, 1929, denied petitioner's request for reconsideration and finally rejected said petition and claim for refund.

13. And for a further and separate claim against the United States this petitioner, as sole surviving executor and trustee, as aforesaid, of the estate of Archibald H. Bull, deceased, further shows the Court that in said claim for abatement of estate tax, hereinbefore mentioned, filed on or about August 10, 1921, the executors and trustees of said estate, referring to schedule "H" of the original return for Federal estate tax, expressly reserved the right to claim additional deductions from the corpus of the estate for additional administration expenses, such as executors' commissions, counsel fees, surrogate fees and other items. That at the time of the filing of such claim for abatement the administration expenses had not been fixed, and that the Commissioner accordingly did not allow them for the reason that they had not been fixed or paid. Further that after the receipt of the said letter of the Commissioner of May 27, 1924, hereinbefore mentioned

(Exhibit "D" hereto), such additional administration expenses were ascertained and paid by the executors and trustees of the estate to the amount of $96,592.95, as follows:

E. D. Mulford, appraising property	$ 50.00
E. W. Phares, appraising property	82.00
C. N. Codding, Surrogate fee	1,386.00
McCarter & English, legal fees and expenses	15,074.95
[fol. 18] Ernest M. Bull, balance of executor's fee	40,000.00
Evelyn P. Bull, balance of executor's fee	40,000.00
	$96,592.95

That accordingly, in said "Petition to Reopen Prior Claim for Refund," filed with the Commissioner on or about November 18, 1927, as hereinbefore set forth (Exhibit "E" hereto), a further deduction from the amount of the taxable estate in said sum of $96,592.95 was duly claimed, and likewise, was also again claimed and demanded in the "Additional Affidavit" hereinbefore mentioned, filed with the Commissioner on or about February 16, 1928 (Exhibit "F" hereto) and also in the formal claim for refund filed with the Commissioner on or about April 13, 1928 (Exhibit "G" hereto). But said claim for refund was likewise rejected and refused by the Commissioner by his letter, hereinbefore mentioned, of June 30, 1928 (Exhibit "I" hereto), and reconsideration thereof was denied and said claim finally rejected by said Commissioner's letter hereinbefore mentioned, on August 20, 1929 (Exhibit "M" hereto). Petitioner submits that said claim should have been allowed by the Commissioner and the corresponding amount of the estate tax should have been refunded in accordance with said claim for refund, and that such amount still remains due and owing from the United States to this petitioner, together with interest thereon.

14. And for a further and separate claim against the United States, this petitioner, as sole surviving executor and trustee, as aforesaid, of the estate of Archibald H. [fol. 19] Bull, deceased, further shows to the Court that in the said claim for refund filed by the executors and trustees on behalf of the estate, on or about October 6, 1922 (Exhibit "H" hereto), in referring to Schedule I of the

original return of said estate tax the executors and trustees reserved the right to claim an additional refund on account of income taxes assessed for the years 1917, 1918, 1919 and 1920. And that, after the filing of said last mentioned claim for refund, and after the letter of the Commissioner of May 27, 1924, hereinbefore mentioned (Exhibit "D" hereto), embodying the Commissioner's action thereon, additional assessments of income taxes have been made by the Commissioner against said estate for the years 1917, 1918, 1919 and 1920, and the executors and trustees have paid such additional income tax assessments out of the funds of said estate in the aggregate amount of $53,326.93, as follows:

Additional 1917 Income Taxes		$31,770.11
Additional 1918 Income Taxes	$22,018.78	
Additional 1919 Income Taxes	37,521.20	
	59,539.98	
Less Overassessment 1/1/20—2/13/20	38,217.46	21,322.52
Additional 1919 Income Taxes		234.30
		$53,326.93

That accordingly, after payment of the last mentioned amounts, this petitioner duly included in his "Petition to Reopen Prior Claim for Refund," hereinbefore mentioned, filed with the Commissioner, on or about November 18, 1927 (Exhibit "E" hereto), a claim for deduction from [fol. 20] the amount of the taxable estate for estate taxes of said sum of $53,326.93, and accordingly included the same in his "Additional Affidavit," filed February 16, 1928, as aforesaid (Exhibit "F" hereto), and also in his claim for refund filed on or about April 13, 1928 (Exhibit "G" hereto). And that the Commissioner should have allowed the said claim for refund for the corresponding amount paid for estate tax; but, nevertheless, the Commissioner by his letter aforesaid of June 30, 1928 (Exhibit "I" hereto), and his letter of August 20, 1929 (Exhibit "M" hereto), denied said petition for refund as to this item, and also denied reconsideration thereof and finally rejected the same. This petitioner submits that there remains due

and owing from the United States to this petitioner as sole surviving executor and trustee of the said estate the amount of overpayments of estate tax corresponding to the deduction in the amount of the taxable estate that should have been allowed and should now be allowed on account of such sum of $53,326.93 so paid for such additional income-tax.

15. And for a further and separate claim against the United States this petitioner, as sole surviving trustee and executor of the said estate of Archibald H. Bull, deceased, as aforesaid, further shows to the Court that in the claim for abatement filed by the executors and trustees of the estate, on or about August 10, 1921, as hereinbefore set forth (Exhibit "B" hereto), in referring to additions to Schedule I as originally returned in the return for Federal estate tax, reference was made to the insurance of steamships by the deceased. And further that at the time of the filing of said claim for abatement, the amounts of such in-
[fol. 21] surance which had been so assumed by the deceased were estimated. That it was not possible at that time to state the exact amounts because the underwriters' adjustment had not then been completed. And further that in addition to the estimated amounts so set up in said claim for abatement, the executors and trustees afterwards paid out of the funds of the estate additional insurance claims to the amount of $9,234.71, as follows:

Insurance Claim, SS "Dorothy," paid March 24, 1924	$2,734.71
Insurance Claim, SS "Beatrice," paid Feb. 26, 1925	6,500.00
Total	$9,234.71

And that, accordingly, this petitioner included in his "Petition to Reopen Prior Claim for Refund," filed on or about November 18, 1927, as heretofore set forth (Exhibit "E" hereto), a claim for a deduction from the amount of the taxable estate for estate tax, the said sum of $9,234.71, and for a corresponding refund of the estate tax, and likewise, said item was claimed in his "Additional Affidavit" filed on or about February 16, 1928, as heretofore set forth (Exhibit "F" hereto) and also in his claim for refund

filed on or about April 13, 1928 (Exhibit "G" hereto). That the same should have been allowed by the Commissioner; but, nevertheless, the said Commissioner, by his letters of June 30, 1928 and August 20, 1929 aforesaid (Exhibits "I" and "M" hereto), denied and rejected this item, and also denied reconsideration thereof and finally rejected the same. And that this petitioner submits there remains due and owing from the United States to this petitioner an [fol. 22] amount overpaid as estate tax on said estate in the amount corresponding to the tax on said sum of $9,234.71.

16. Your petitioner, therefore respectfully submits that there remain due and owing from the United States to this petitioner the following amounts:

First. The said sum of $62,677.44, paid by this petitioner on June 14, 1928, pursuant to the Commissioner's determination of April 9, 1928 of supposed "deficiency" in income tax of said estate, together with interest thereon, since the date of such payment, June 14, 1928, as hereinbefore set forth in paragraph numbered "8" hereof, and preceding paragraphs.

Or else, in the alternative, the sum of $47,643.33, together with interest thereon from April 9, 1928, as hereinbefore set forth in paragraph numbered "9" hereof;

and

Second. Also the further sum of $41,517.45, with interest thereon since November 18, 1927, the date of filing of said "Petition to Reopen Prior Claim for Refund" (Exhibit "E" hereto), being the amount of the overpayment on account of Federal estate tax of said estate of the various items mentioned and set forth in said last mentioned petition of November 18, 1927, and likewise in the said "Additional Affidavit," filed on or about February 16, 1928 (Exhibit "F" hereto), and in said formal claim for refund filed on or about April 13, 1928 (Exhibit "G" hereto), and in the foregoing paragraphs numbered "10" to "15" inclusive hereof, of deductions which should have [fol. 23] been allowed by the Commissioner and should now be allowed against the amount of the estate taxable for the purpose of estate tax, viz:

For charitable bequests	$127,914.54
For administration expenses	96,592.95
For additional income taxes	53,326.93
For additional insurance	9,234.71
Total	$287,069.13

17. Petitioner further says that, as sole surviving executor and trustee as aforesaid, he is the sole owner of the foregoing claim; that no assignment or transfer of same, or any part thereof, has been made; that petitioner, as such executor and trustee, is justly entitled to the amount claimed from the United States after allowance of all just credits and offsets; that petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the Government of the United States and that he believes the facts as stated in this petition to be true.

Wherefore petitioner prays judgment for such sums as may be justly due and owing to him as sole surviving executor and trustee of the Estate of Archibald H. Bull, deceased, and for such other, further and different relief to which this Court may find petitioner to be entitled.

Ernest M. Bull, as Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased.

[fol. 24] *Duly sworn to by Ernest M. Bull. Jurat omitted in printing.*

[fol. 25] EXHIBIT A TO PETITION

Commissioner of Internal Revenue,

Washington, D. C.

Attention Income Tax Unit

DEAR SIR:

In re Estate of Archibald H. Bull—E. M. Bull, Trustee.
Income and Estate Taxes for Period of 1920

Application is hereby made for re-opening of both the estate tax return and the income tax return covering the period of 1920, under Treasury Decision 4235.

It is contended that both the estate tax and the income tax returns are so tied up that neither one of these returns should be considered as closed until the Board of Tax Appeal's decision on the income tax questions of the estate and the Commissioner has had an opportunity to acquiesce or non-acquiesce, and after final disposition of the case of George Nichols and Mary B. Nichols v. United States, U. S. Court of Claims, in which case a petition for certiorari was filed in the Supreme Court of the United States, which petition was denied on April 16, 1928.

It is also contended that all claims for refunds, abatements, etc., together with protests and briefs now on file, should be considered a part of this application, together with Revenue Agent's Report dated January 4, 1929, and protest which will be filed in due time.

It is further contended that these cases come clearly within Treasury Decision 4235, as the questions in dispute in both these cases could not have been properly determined [fol. 26] or disposed of until the Board's decision and the final disposition of the Nichols v. United States case referred to above, and that the Government should make compensating adjustments in both of these cases when the issues involved have been finally considered and determined.

It is requested that a conference be granted, in order that these questions may be discussed with representatives of both the Income Tax and Estate Tax Divisions.

Alfred S. Frodel, Attorney for Taxpayer.

January 30, 1929.

[fol. 27] EXHIBIT B TO PETITION

Treasury Department,

U. S. Internal Revenue

Claim for Abatement, Taxes Erroneously or Illegally Assessed

Important: This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.

STATE OF N. J.,
County of Essex, ss:

Estate of Archibald H. Bull, 40 West Street, New York City, N. Y.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of claimant named above, and that the facts stated below with reference to said claim are true and complete.

1. Business engaged in by claimant—Estate.
2. Character of assessment or tax—Estate Tax.
3. Amount of assessment—$419,594.30.
4. Amount now asked to be abated—$83,329.60.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks or demands abatement of said amount for the following reasons:
[fol. 28] See statement and exhibits annexed. Should further information be desired please address McCarter & English, 765 Broad Street, Newark, N. J., the attorneys of the Estate.

(Signed) Ernest M. Bull, Executor.

Sworn to and subscribed before me 10th day of August, 1921. Arthur F. Egner, Master in Chancery of New Jersey.

[fol. 29] AFFIDAVIT OF ERNEST M. BULL

STATE OF NEW JERSEY,
County of Essex, ss:

Ernest M. Bull, being duly sworn, deposes and says:

I am one of the executors of the estate of Archibald H. Bull, deceased, and as such, I have executed the claim for abatement hereunto annexed. The matters and things contained in said claim for abatement are true to the best of my knowledge, information and belief.

Mr. Archibald H. Bull died on the 13th day of February, 1920, leaving a very considerable estate. A return on form

706 was prepared under *by* direction and filed by me within the time prescribed by law. For various reasons beyond the control of the executors of said estate, the said return was not in all respects full and complete. Upon the basis of information since obtained, therefore, we present herewith a revision of the figures contained in our return in certain respects indicating a net estate of a less amount than that in the original return, and we present accordingly our claim for abatement.

The particulars in which said return should be amended are as follows:

Additions to Schedule D of Original Return

Since the making of the original return, the executors of the estate have made collection of other assets in addition to those originally reported. Exhibit "1" hereto annexed, contains a true statement of such additional assets indicating additional items amounting to $17,741.54. The items contained in said Exhibit are self-explanatory and no further explanation is deemed to be necessary.

[fol. 30] Additions to Schedule "C" as Originally Returned

A recomputation of the amount of interest accrued upon the items set forth in Schedule "C" up to the date of decedent's death indicates that such items were not correctly figured in the original return. Annexed hereto and marked Exhibit "2" is a schedule showing the proper computation of said interest. Such computation indicates a total amount of interest accrued up to the date of death of decedent of $103.08. The original return included an item of $98.33 on this account indicating, therefore, an addition to this schedule of the sum of $4.75.

Reductions from Schedule B on Account of Recomputation of Accrued Interest

A recomputation of the amount of interest accrued up to the date of decedent's death upon the stocks and bonds set forth in Schedule "B" of the original return indicates that the computation of interest set forth in said return is erroneous. Annexed hereto and marked Exhibit "3" is a full and correct computation of interest accrued upon the stocks and bonds therein set forth up to the date of de-

cedent's death. Said Exhibit indicates a total accrued interest amounting to $7,100.34, as against a total of $28,854.32 reported in the original return and indicating a difference of $21,753.98, which should be deducted from the amount of the estate.

[fol. 31] Deductions from Schedule "B" on Account of Securities Not Part of the Estate of Decedent

Exhibit "4" hereto annexed contains a list of certain stocks which were returned in Schedule "B" of the original return as a part of the decedent's estate, but were not in fact his property upon the date of his death.

The stocks above mentioned, although standing in the name of the decedent upon the date of his death, were at that time in fact held by him as Trustee for Evelyn B. McLain and stocks should not have been returned as a part of his estate. The said stocks were at one time the property of the decedent but were, on the Christmas preceding his death and not in contemplation of death or with any intention of such gift being intended to take effect at or after his death, given as a Christmas present by the said decedent to his daughter, Evelyn B. McLain. The decedent on or about the 24th day of December, 1919, executed a declaration of trust evidencing such gift. Annexed hereto and marked Exhibit "A" is a true copy of such declaration of trust.

Additional Items to Schedule "H" of Original Return

Annexed hereto and marked Exhibit "5" is a statement of items to be added to Schedule "H" of the original return. The items therein set forth are mostly self-explanatory. With respect to the items therein included covering the fees of the Union County Surrogate on first accounting, estimated executors' commissions and estimated counsel fees, deponent deposes and says as follows:

[fol. 32] The executors of the decedent's estate have filed in the domicile of the decedent, Union County, New Jersey, a first accounting of said estate. The gross amount of said estate indicated by said first accounting and based upon inventory valuations without the deduction of any charges against said estate, amounted to the sum of $4,050,328.61 of principal and $656,346.04 of income, making

the total accounted for $4,706,674.65, and a net balance in the hands of accountants, upon such valuation, of $3,218,665.85 of principal, and $53,216.26 of income. Upon said first accounting, the executors asked for the allowance of commissions based upon the amount of the gross income received by the executors, but no application was then made for an allowance of commissions upon the amount of the principal of the estate, and at the same time the allowance of a counsel fee upon the same basis was made to the Union County Orphans Court. The said first accounting of the executors was approved by the Union County Orphans Court by a decree entered in said Court on the 29th day of July, 1921, a true copy of which decree is hereto annexed and marked Schedule "B". Under said decree, the executors were allowed the sum of $20,000.00 on account of such commissions as may be allowed to them upon their final account as executors; Surrogate's fees were allowed amounting to $4,719.67, and a counsel fee was allowed to the counsel of the executors amounting to $5,000.00, together with their disbursements of $125.73.

The amount of commissions allowed by the Court to the executors on account of their fees, was slightly in excess of 3% upon the amount of income which had been received by them.

It is the intention of the executors to file a final account of their administration as such executors and to turn over [fol. 33] the estate to the trustees appointed under the will of the decedent at a reasonable early date, and at that time executors' commissions on the entire estate will be asked for and an additional counsel fee will also be allowed. For that reason, the estimated amount of these additional allowances has been added to Schedule "H". The estimated executors' commissions, amounting to $140,000.00, is slightly less than 3% of the gross amount of the estate (from this amount, of course, the $20,000.00 allowed will be deducted), and the counsel fees estimated are $15,000.00 (from which amount also the counsel fee already allowed will be deducted).

Additions to Schedule "1" as Originally Returned

Annexed hereto and marked Exhibit "6" is a statement of items to be added to Schedule "1" as originally returned. All of the items therein contained are self-explanatory.

With respect to the item of $74,610.28 being general and particular average claims on insurance of steamers to the A. H. Bull Steamship Co., deponent says as follows:

Decedent was the controlling stockholder in A. H. Bull Steamship Co., a New Jersey corporation, owning over 50% of its capital stock. The said corporation was and is engaged in the steamship business, owning numerous vessels.

For a number of years before his death, decedent had an agreement with the corporation whereby he assumed the risk of percentage of the marine losses suffered by the corporation based upon his percentage of stock holdings in the corporation; this agreement in effect rendering him a co-insurer. The portion of the risk not thus assumed by decedent was insured by the corporation in various insurance companies. As an off-set to the risk which he thus [fol. 34] assumed, decedent was paid from time to time sums equivalent to the amount which it would have been necessary for the company to pay for insurance had it insured the portion of the risk thus assumed by Mr. Bull. The portion of the risk assumed by Mr. Bull amounted to approximately 15% to 20% of the total insurance carried on the vessels. From time to time during his lifetime, decedent made various payments to the corporation on account of losses thus sustained by it. At the time of his death, various claims for losses were pending and the amount attributable to Mr. Bull on account of the percentage of the total risk assumed by him, has been estimated at the sum of $74,610.28. This sum is, therefore, included as a valid claim on the part of the A. H. Bull Steamship Co. against his estate. Of this amount, the sum of $44,610.28 has already been paid by the estate to the A. H. Bull Steamship Co. and the remainder, or the sum of $30,000.00, is estimated to be still due and owing from the estate to the A. H. Bull Steamship Co. The entire amount of $74,610.28 was included by the executors in their account filed in the Union County Orphans' Court as a charge against the estate and such amount was audited and allowed by that Court as a claim against the estate.

Deduction Because of Erroneous Inclusion in Gross Assets of Estate of Assets Set Forth in Schedule of Original Return

In Schedule "E" of the original return, the executors of the estate set forth certain gifts made by the decedent

during the years 1919 and 1920. As the original Schedule "E" indicates, these gifts were not made in contemplation of death nor were they intended to take effect at or after death, and for that reason in Schedule "E," the amount of [fol. 35] these gifts was not extended into the second column for inclusion in the gross estate. Through an error, however, in the preparation of said original schedule, the value of said gifts amounting in all to the sum of $212,587.20, was included in the recapitulation on page thirteen of the return as an item of the gross estate, thereby improperly increasing the net amount of the estate by $212,587.20. For that reason, therefore, we now claim a deduction of that amount. Annexed to the original return are copies of trust instruments and also an affidavit of deponent with respect to such gifts.

Upon the basis of the exhibits hereto annexed, therefore, deponent respectfully recomputes the amount of the estate and the tax payable thereon as follows:

Net amount of estate set forth in original return	$3,738.089.45
Additions to Schedule "D" as per Exhibit 1	17,741.54
Additions to Schedule "C" as per Exhibit 2	4.75
Gross total	$3,755,835.74
Deductions from Schedule "B" on account of recomputation of interest as per Exhibit 3	$21,753.98
Deductions from Schedule "D" as per Exhibit "4"	23,935.40
Additions to Schedule "H" as per Exhibit "5"	160,597.69
Additions to Schedule "1" as per Exhibit "6"	119,682.35
Deductions because of erroneous inclusion of items set forth in Schedule "E" in gross amount of estate	212,587.20
Total deductions	$538,556.62

[fol. 36]

Gross total above set forth	$3,755,835.74
Deductions above set forth	538,556.62
Revised net amount of estate	$3,217,279.12

Net amount of estate as originally reported	$3,738.089.45
Revised net total of estate	3,217,279.12
Decrease	$520,810.33

Computation of tax upon this amount: $520,-810.33 × 17% equals $83,329.65.

Amount of tax as set forth in original return	$419,594.31
Decrease above set forth	83,329.65
Corrected amount of tax due	$336,264.66
Paid on account	250,000.00
Balance of tax due	$86,264.66

Presented with this claim for abatement is the check of the executors of the estate for the sum of $86,264.66, which deponent respectfully states is the proper amount of tax payable by the estate and which he deposes is the correct amount thereof to the best of his knowledge and belief.

(Sgd.) Ernest M. Bull.

Subscribed and sworn to before me this — day of August, 1921. Arthur F. Egner, Master in Chancery of New Jersey.

[fol. 37] EXHIBIT "1" TO AFFIDAVIT

Additions to Schedule "D"

Debts Collected, or Corrections of Inventory Resulting in a Profit or Increase to the Estate

Mar. 11, 1920—Economical Homes Assn., reimbursement of wages for Jan. & Feb. 1920, paid to chauffeur, Otto Mull	$220.00
Mar. 12, 1920—Margaret C. Woodruff, payment on loan in excess of amount reported in inventory	80.00
June 15, 1920—Collector of Internal Revenue, refund of overpayment of 1916 income tax on stock dividends, deducted from payment of 1919 taxes	16,662.41

July 6, 1921—Union County Trust Co. Bank balance was set up in inventory as $5,693.86 whereas balance on 2/13/20 was $6,472.99 .... 779.13

$17,741.54

[fol. 38] EXHIBIT 2 TO AFFIDAVIT

Recomputation of Accrued Interest to Date of Decedent's Death on Items Set Forth in Schedule C

		Par.	Period	Interest
Mar. 17, 1920.	L. J. Wall, 6% Loan—from 12/10/19.....	$3,000.00	65 days	$ 32.14
June 9,	Ida L. Sanford, 5% Mtge. from 12/2/19...	6,000.00	73 days	70.94
	Ida L. Sanford, 6% Mtge. from 12/2/19...	900.00		
				$103.08

EXHIBIT 3 TO AFFIDAVIT

Recomputation of Accrued Interest to Date of Decedent's Death on Items Set Forth in Schedule B

1920		Par	Period	Interest
Mar. 9.	City of Cleveland, 5% Bonds from 9/1/19.....	$10,000.00	166 days	$228.02
	County of Union, 4¼% Bonds from 8/1/19.....	42,000.00	6 mos.	997.50
	City of Jersey City, 4½% Bonds from 9/1/19.....	25,000.00	166 days	513.03
	City of Toledo City, 4½% Bonds from 9/1/19.....	5,000.00	166 days	102.61
	City of Atlantic City, 5% Bonds from 6/1/19.....	5,000.00	6 mos.	125.00
Mar. 11.	Atlantic Coast Line RR., 5% Bonds from 9/1/19..	1,000.00	166 days	18.23
	Bull-Insular Line 6% Bonds from 8/1/19.....	9,000.00	6 mos.	270.00
May 4.	Federal Land Bank, 5% Bonds from 11/1/19....	50,000.00	105 days	721.15
May 5.	3rd Liberty Loan, 4¼% Bonds from 9/15/19....	24,050.00	151 days	424.01
	Township of Weehawken, 5% Bonds from 10/1/19.	9,000.00	136 days	167.21
	4th Liberty Loan 4¼% Bonds from 11/15/19...	36,000.00	90 days	378.29
	2nd Comb. Lib. Loan 4¼% Bonds from 11/15/19...	16,000.00	90 days	166.13
	War Finance Corp. 5% Bonds from 10/1/19....	7,000.00	136 days	130.06

		Par	Period	Interest
[fol. 39]				
	Federal Farm Loan 4½% Bonds from 11/1/19	25,000.00	105 days	324.52
	Joint Stock Land Bank 5% Bonds from 11/1/19	50,000.00	105 days	721.15
May 6.	Bull Insular SS. Co. 6% Bonds from 10/1/19	3,000.00	136 days	66.88
June 1.	City of Boston Reg. 3½% Bonds from 12/1/19	10,000.00	75 days	71.72
June 16.	1st Liberty Loan 3½% Bonds from 12/15/19	88,000.00	60 days	504.92
June 16.	Victory Loan 3¾% Bonds from 12/15/19	150,000.00	60 days	922.13
	City of Atlantic City 5% Bonds from 12/1/19	5,000.00	75 days	51.23
Aug. 5.	City of Trenton 4½% Bonds from 2/1/20	50,000.00	13 days	80.36
Sept. 29.	County of Union 4¼% Bonds from 8/1/19	2,000.00	6 mos.	23.75
	County of Union 4¼% Bonds from 2/1/29	43,000.00	13 days	72.94
1921 June 17.	Liberty Bond, 1st, 3½% Coupon due 6/15/19			17.50
		Total		$7,100.34

[fol. 40] EXHIBIT 4 TO AFFIDAVIT

Items to Be Deducted from Schedule "B"

Stocks Held in Name of Decedent, but Not His Property at Date of Death, and Subsequently Transferred

Description	Amount
Plainfield Union County Water Co. 5 shares @ $125.00. Transferred to Ernest M. Bull, Trustee for Evelyn B. McLain	$625.00
Atlas Portland Cement Co. Preferred 16 shares @ $97.00. Transferred to Ernest M. Bull, Trustee for Evelyn B. McLain	1,552.00
American Cotton Oil Co. Preferred 10 shares @ $88.00. Transferred to Ernest M. Bull, Trustee for Evelyn B. McLain	880.00
Worthington Pump & Machinery Co. Pfd. "B" 20 shares @ $70.00. Transferred to Ernest M. Bull, Trustee for Evelyn B. McLain	1,400.00
Baltimore & Ohio R. R. Co. 20 shares @ 27⅝. Transferred to Ernest M. Bull, Trustee for Evelyn Bull McLain	552.00

[fol. 41]

Baltimore & Ohio R. R. Co. Pfd.	
20 shares @ $42.00. Transferred to Ernest M. Bull, Trustee for Evelyn Bull McLain	840.00
Illinois Central R. R. Co.	
30 shares @ 80⅞. Transferred to Ernest M. Bull, Trustee for Evelyn Bull McLain	2,426.40
Union Pacific R. R. Co. Pfd.	
10 shares @ $66.00. Transferred to Ernest M. Bull, Trustee for Evelyn Bull McLain	660.00
Economical Homes Association	
600 shares @ $25.00. In name of A. H. Bull, Trustee, to be transferred to Ernest M. Bull, Trustee for Evelyn Bull McLain	15,000.00
Total Exhibit "4"	$23,935.40

[fol. 42] EXHIBIT 5 TO AFFIDAVIT

Additions to Schedule H

Funeral, medical & legal expenses, and administrative expenses paid by executor and not included in schedule previously filed.

1921		
Mar. 8.	Inheritance Tax—Atchison Stock	$12.43
" 14.	Register & Transfer Co., transfer tax on Singer stock	1.00
" 22.	Austin & Austin, legal services re N. Y. State transfer tax	510.00
	N. Y. State Comptroller, transfer tax	296.72
1920		
Apr. 18.	H. D. Snyder, transfer of Atlas Portland Cement Stock	1.50
Nov. 11.	Treas. State of Maine, inheritance tax	11.88
Dec. 10.	Commonwealth of Penn., inheritance tax	44.49
	Fees of Union County Surrogate on first accounting	4,719.67
	Executor's commissions (estimated)	140,000.00
	Counsel fees (estimated)	15,000.00
		$160,597.69

[fol. 43] EXHIBIT "6" TO AFFIDAVIT

Additions to Schedule "1"

Debts of decedent paid by executor and not included in schedule previously filed.

1920			
Mar.	1.	Sargent & Co., Inc., 12/9/19, keys	$1.56
		McFarland Taylor & Costello, Inc., 1/20/20—services	28.34
		H. W. Burchard, Inv. 2/7/20, balance subscription Ladies' Home	1.25
		Geo. Lueders & Co., Inv. 2/13/20, olive oil	7.50
		E. B. Mayrowitz, Inv. Jan. 1920, remodelling phinophor	3.70
		C. S. Wood, 125 ft. cover	2.50
		R. M. Barton, 100 lbs. sugar	10.00
		Reed & Barton, Inv. 2/17/20, wedding gift	45.00
		India House, 2/18/1920, dues 6 mos	68.75
1920			
Mar.	8.	N. Y. Produce Exchange Gratuity Fund	15.00
May	11.	Economical Homes Assn., balance of account	2,658.75
Dec.	31.	N. Y. State Income Taxes, 1/1/20/2/13/20	359.14
		Federal Income Taxes, 1/1/20/2/13/20	40,893.46
		A. H. Bull & Co., general and particular average claims on insurance of	
[fol. 44]		steamers	74,610.28
Mar.	22.	Rev. W. W. Heberton, Treas. Bd. Min. Relief, 1916 pledge	100.00
	22.	Y. M. C. A., San Juan	100.00
Apr.	14.	Collector of Internal Revenue, 30 days int. on income tax	51.12
"	20.	Hughes, Rounds, Schuman & Dwight, services, 1916 stock dividend	476.00
1921			
June	21.	Elizabeth Chamber of Commerce, 19 memberships under pledge	250.00
			$119,682.33

[fol. 45] EXHIBIT "A" TO AFFIDAVIT

Declaration of Trust

I, Archibald H. Bull, of the City of Elizabeth, Union County, New Jersey, do hereby declare a trust in favor of my daughter, Evelyn B. McLain in the sum of Twenty-five Thousand Dollars ($25,000.) represented by the securities listed below, my said daughter to have the income of said trust as long as she shall live, and on her death, the principal thereof to be divided between her brother, and sister, equally, share and share alike, or the children them surviving.

And I further declare said principal sum of Twenty-five Thousand Dollars ($25,000) to be no part of my estate.

Dated December —, 1919.

Archibald H. Bull (L. S.)

List of Securities

C 15499	10	shares	American Cotton Oil Prfd.
D 130927	20	"	Common
D 132205			Balt. & Ohio
E 18521	20	"	Prfd. R. R. Co.
E 17697			
412	16	"	The Atlas Portland Cement Co.
328	5	"	Plainfield Water Co.
R 77481	10	"	Union Pacific Co. (R. R. Co.)
O 84059	10	"	Illinois Central R. R. Co.
T 160634	10	"	
B 03247	20	"	Class B 6% pfd. Worthington Pump
36	600	"	Economical Homes Assn.

[fol. 46] SCHEDULE "B" TO AFFIDAVIT

Union County Orphans Court

May Term A. D. 1921

In the Matter of the Estate of ARCHIBALD H. BULL, Deceased.

Decree

The Surrogate having audited and stated the First account of Ernest M. Bull and Evelyn P. Bull, Executors of and Trustees under the Last Will and Testament of Archi-

bald H. Bull, deceased, and placed the same on the files of his office twenty days previous to the 29th day of July, A. D. nineteen hundred and twenty-one, and having on the day last aforesaid reported the same to this Court for allowance and settlement, and it having been proved to the satisfaction of the Court that notice of their intention to settle the said account on the 29th day of July, A. D. nineteen hundred and twenty-one, in this Court was given by said accountants according to law; and application being made on due notice for the allowance of commissions and counsel fees, and the Court having examined the said account and the vouchers and receipts for payments and disbursements claimed therein, and having found the same to be correct [redacted]articulars, and no exceptions being made thereto,

It is on this 29th day of July, A. D. nineteen hundred and twenty-one, by the Orphans Court of the County of Union, [fol. 47] in the State of New Jersey, ordered, adjudged and decreed that the said account be in all things allowed as reported, and that there is a balance remaining in the hands of said accountants amounting to the sum of $3,271,-882.12 and that out of said balance said Executors be and they are allowed the sum of $20,000.00 on account of such commissions as may be allowed to them upon their final account as Executors;

And it is further ordered that said Executors and Trustees do further pay out of said balance in their hands, surrogate's fees amounting to $4,719.67 and a counsel fee of $5,000.00 to McCarter & English, Proctors of said accountants, together with their disbursements of $125.73.

C. B. Pierce, Judge.

A true copy.—Charles M. Codding, Surrogate of Union County, N. J.

[fol. 48] [Endorsed:] Union County Orphans Court. May Term, A. D. 1921. Estate of Archibald H. Bull, Deceased. Decree on First Account. Filed July 29th, 1921. Charles N. Codding, Surrogate.

[fol. 49] EXHIBIT "C" TO PETITION

Treasury Department

Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:RRR.

Aug. 9, 1929.

Mr. Alfred C. Frodel, % David A. Buckley, Jr., 815 15th Street, N. W., Washington, D. C.

SIR:

Reference is made to your brief dated January 30, 1929, wherein you request a reconsideration of the income and estate tax liability of the Estate of Archibald H. Bull, Elizabeth, New Jersey, for the period February 14, 1920, to December 31, 1920

It is observed that taxpayer filed an appeal with the United States Board of Tax Appeals from the determination of a deficiency of $261,212.55, as shown in Bureau letter dated July 10, 1925. The case was tried upon its merits on November 4, 1926, and a decision was rendered on August 8, 1927, as reported in 7 B. T. A. 993, Docket #6888.

The decision of the Board was acquiesced in by the Bureau on April 9, 1928, and a deficiency of $55,166.49 which was determined pursuant to such decision, was paid by the taxpayer on June 14, 1928.

[fol. 50] On July 11, 1928, a claim for refund of $62,677.44 was filed which was based upon additional evidence omitted before the Board in the trial of the case. This claim was rejected after the taxpayer was afforded an oral hearing on April 9, 1929.

As no new and material information has been submitted since the conference on April 9, 1929, and particularly since the Bureau views the decision of the Board in this case as final, even though the petition was filed prior to the passage of the 1926 Act, a modification of the decision of the Board will not be made in any particular.

Accordingly, your request for a redetermination of the tax liability is denied.

Respectfully, Robert H. Lucas, Commissioner.

[fol. 51] EXHIBIT "D" TO PETITION

District of Fifth New Jersey

Estate of Archibald H. Bull

Date of Death—February 13, 1920

MT-ET-809-Cl.A.R.-PEN.

Ernest M. Bull, Executor, Estate of Archibald H. Bull, care of Collector, Newark, New Jersey.

SIR:

Reference is made to the claims filed by you on behalf of the above named estate for abatement of $83,329.65 of the tax, and for refund of $166,428.60, paid under the Revenue Act of 1918.

These claims have been carefully considered in connection with the agent's report of investigation, which was conducted with a view to verifying the correctness of the return.

By reason of certain changes recommended by the investigating officer, the estate is liable for a gross tax of $312,127.17. As a tax of $336,265.28 has been paid by the estate, it appears that an excess payment has been made in the sum of $24,138.11. It appears that the assessment made on the basis of the return was $419,594.31, of which the sum of $336,265.28 has been paid, leaving an outstanding assessment of $83,329.03.

Therefore, your claim for abatement of $83,329.65 will be prepared for allowance in the sum of $83,329.03, and is rejected in the sum of $.62.

Your claim for refund of $166,428.60 will be prepared for allowance in the sum of $24,138.11, and is rejected in the sum of $142,290.49.

[fol. 52] However, before the claim can be finally certified, it will be necessary for you to submit in support thereof a short-form certificate of current attestation, from the court, showing your appointment as executor and that such ap-

pointment remains in full force and effect. In the event that the executor has been discharged, there should be submitted in lieu of the above certificate, a statement of the court (a) certifying to the fact of discharge, and (b) setting forth the names and addresses of the persons to whom the refund should be made, and indicating what portion of the amount subject to refund, each should receive.

On the third sheet of this communication is a complete summary of the returned and determined values placed upon the property of the estate, and also the claimed and allowed deductions. Following the summary is an explanation of the changes made.

[fol. 53] Estate of Archibald H. Bull

Date of Death—February 13, 1920

Summary

	Returned	Determined on review
Gross estate:		
Real estate	$80,000.00	$80,000.00
Stocks and bonds	3,910,014.69	3,264,701.01
Mortgages, notes, cash and insurance	103,959.82	108,808.53
Other miscellaneous property	37,751.89	203,593.03
Transfers	212,367.20	103,605.34
Powers of appointment	.....	.....
Property identified as taxed within five years	.....	.....
Total gross estate	$4,344,313.60	$3,622,707.91
Deductions:		
Funeral expenses	1,348.55	1,348.55
Administration expenses—		
Executor's fee	.....	20,000.00
Attorney's fee	.....	5,125.73
Miscellaneous	1,139.80	6,737.49
Debts of decedent	421,735.80	536,990.86
Unpaid mortgages	.....	.....
Net losses during settlement	.....	.....
Support of dependents	.....	.....
Property identified as taxed within five years	.....	.....
Charitable, public, and similar bequests	132,000.00	136,065.46
Specific exemption (resident decedents only)	50,000.00	50,000.00
Total	$606,224.15	$756,288.09
Net estate for tax	$3,738,089.45	$3,066,419.82
Total tax	$419,594.31	$312,127.17
Additional tax paid	.....	$536,265.28
Excess payment	.....	$24,138.11

[fol. 54] The changes indicated below show the specific adjustments as determined by this Bureau, in accordance with the provisions of the Federal estate tax law.

Gross Estate	Returned	Determined
Stocks and Bonds—		
$79,000.00 U. S. First Liberty Loan, 3½'s	$76,329.80	$76,400.90
Accrued interest	3,214.95	454.52
$7,500.00 U. S. First Liberty Loan, 3½'s	7,246.50	7,253.25
Accrued interest	305.22	43.15
$1,500.00 U. S. First Liberty Loan, 3½'s	1,449.30	1,450.65
Accrued interest	61.02	8.63
$16,000.00 U. S. Second Liberty Loan, 4¼'s	14,544.00	14,512.00
Accrued interest	847.28	167.67
$24,000.00 U. S. Third Liberty Loan, 4¼'s	22,396.80	22,411.20
Accrued interest	1,440.91	421.97
$50.00 U. S. Third Liberty Loan, 4¼'s	46.66	46.69
Accrued interest	3.01	.88
$35,000.00 U. S. Fourth Liberty Loan, 4¼'s	31,815.00	31,857.00
Accrued interest	1,977.41	493.12
$1,000.00 U. S. Fourth Liberty Loan, 4¼'s	909.00	910.20
Accrued interest	56.60	14.09
$149,000 U. S. Victory Loan, 4¼'s	145,662.40	145,617.70
$1,000.00 U. S. Victory Loan, 4¼'s	977.60	977.30
Accrued interest on above Victory Loan Bonds	6,747.40	1,386.99
$50,000.00 Joint Stock Farm Loan Bonds	48,750.00	50,000.00
Accrued interest	5,207.19	719.18
Accrued interest of $50,000 Federal Farm Loan Bonds	3,207.19	719.18
Accrued interest on $25,000 Federal Farm Loan Bonds	1,443.91	323.63
Accrued interest on $7,000 War Finance Corporation, 5's	128.20	130.41
Accrued interest on $50,000 City of Trenton 4½'s	73.92	80.14
Accrued interest on $45,000 Union County, New Jersey, 4¾'s	2,109.58	1,102.08
Accrued interest on $25,000 City of Jersey, 4½'s	1,630.83	611.65
Accrued interest of $9,000 Weehawken-Hudson Company, 5's	614.60	167.67
[fol. 55]		
Accrued interest on $10,000 City of Cleveland, 5's	724.62	227.40
Accrued interest on $5,000 Toledo District School 4½'s	326.19	102.33
Accrued interest on $5,000 Atlantic City Water Bonds	299.82	159.06
Accrued interest on $10,000 Boston registered bonds	99.84	71.92
Accrued interest on $1,000 Atlantic Coast Line 4's	44.65	18.19
Accrued interest on $9,000 Atlantic Coast Line 4's	45.00	291.48
Accrued interest on $3,000 Bull Insular Steamship Co. 6's	245.88	67.01
20 shares Baltimore & Ohio R. R. Company, Common	552.00	577.50
20 shares Baltimore & Ohio R. R. Company, Pfd.	840.00	855.00
30 shares Illinois Central R. R. Company, Common	2,426.40	2,445.00
12,550 shares The A. H. Bull Steamship Company	3,137,500.00	2,510,000.00
50 shares Crowell-Thurbow Steamship Company, Common	4,000.00	4,275.00
100 shares Morristown, Union & Middlesex Lighting Company	6,000.00	6,500.00
60 10/19 shares Connecticut Steel Corporation, Common	.....	1,210.53

Gross-Estate	Returned	Determined
50 shares Cuban Cane Sugar Co. Common	2,050.00	2,106.25
10 shares Young Men's Building & Loan Association of Elizabeth, New Jersey	559.89	507.47
Mortgages, Notes, Cash and Insurance—		
Cash in Union County Trust Company, Elizabeth, N. J.	5,693.86	6,488.30
Insurance payable to estate of decedent	74,321.24	78,370.76
Accrued interest on $6,900 mortgage note	67.84	70.94
Accrued interest on $3,000 mortgage note	30.49	32.14
Other Miscellaneous Property—		
Accrued interest on loan of money from Archibald H. Bull to Mary C. Woodruff	.....	80.00
Undivided interest in partnership A. H. Bull & Co.	24,124.26	235,202.99
Certificate of membership in New York Produce Exchange	3,400.00	3,000.00
[fol. 56]		
Pierce-Arrow Touring Car	6,800.00	5,000.00
Reimbursement of wages paid by decedent for the Economical Homes Association	.....	220.00
Refund ofo verpayment of 1916 income taxes	.....	16,662.41
Transfers—		
Gifts from the decedent during 1919 to his daughter-in-law, Mrs. Edith U. Bull; his wife, Mrs. Evelyn P. Bull, and his daughter, Mrs. May V. D. Kiggins of the items set out under Class I	66,355.00	
Transfers to Benjamin W. Bull and Georgia H. Bull, pursuant to declaration of trust dated January 7, 1918, and May 27, 1919, of the items set out under Class II	39,982.20	
Transferred to James H. Bull and Mary E. Bull, pursuant to declaration of trust dated May 17, 1917:		
Reversionary interest in 5 shares of A. H. Bull Steamship Company	1,250.90	605.34

Deductions	Determined	Returned
Executors' fee	$20,000.00	$000.00
Attorneys' fee	5,125.73	000.00
Miscellaneous administration expenses	6,737.49	1,139.80
Debts of decedent	536,900.86	421,735.80
Charitable bequests	136,085.46	132,000.00
Difference between net estate, returned and determined to balance	.....	$671,669.63

Executor's fees, attorneys' fee and miscellaneous administration expenses are deducted in the actual amounts expended therefor, as disclosed upon investigation.

Under the caption "debts of Decedent", deduction is allowed of all of the items claimed in the return. There is also allowed under this caption the sum of $13,000, balance due by decedent to the Elizabeth General Hospital; $57,182.99, the amount which it appears the estate will be called upon to pay in connection with the claims of insuranse of

steamers of the A. H. Bull and Company; and $45,072.07, [fol. 57] the total of the additional items set out in the claim for abatement.

No deduction is made for the sum of $6,678.34, claimed for income tax, inasmuch as this has not been paid by the estate.

Under the caption "Charitable, Public and Similar Gifts and Bequests", deduction is made of the following items:

Present worth of bequests to charitable institutions, amounting to $132,000. payable at the death of decedent's widow, $91,825.86.

Present worth of remainder in several trust funds each payable to the charitable institution after the death of several joint or singular life tenants, the principal of these trusts being included under the caption "Transfers", and designated as "Classes 4, 5, 6, 7, 8, 9 and 10." Present worth of the remainder of each of these items is as follows:

Class 4, $9,080.10.
" 5, 7,491.40.
" 6, 8,167.48.
" 7, 5,976.28.
" 8, 5,275.70.
" 9, 4,708.80.
" 10, 3,559.90.

This letter shows the Bureau's determination of the estate tax liability of this estate. All questions relating to the discharge of this tax should be taken up direct with the Collector and not with this office.

Respectfully, J. B. Bright, Acting Commissioner.
BIK.

[fol. 58] EXHIBIT "E" TO PETITION

In re Estate of Archibald H. Bull

Ernest M. Bull, Executor, 40 West Street, New York City, New York

MT-ET-809-CL.-A.R.-PEM.

Petition to Re-open Prior Claim for Refund

STATE OF NEW YORK,
County of New York, ss:

Ernest M. Bull, being duly sworn according to law, upon his oath deposes and says:

I am the sole surviving executor of the estate of Archibald H. Bull, late of Elizabeth, New Jersey, who died February 13th, 1920.

Following the filing of the return for Federal estate taxes a claim for abatement was filed, verified August 10th, 1921, and thereafter a claim for refund was filed, verified October 6th, 1922.

Thereupon the Commissioner fixed the net estate at $3,066,419.82, as verified by the Commissioner's letter dated May 27th, 1924 (MT-ET-809-CK.-A.R.-PEM).

At the time of the filing of the original return and also at the time of the filing of the claims for abatement and refund the widow of Archibald H. Bull, Evelyn P. Bull, was living.

Under the terms of the will of Archibald H. Bull, the income of the residue of the estate was payable to his said widow and certain charitable bequests set forth in the ninth paragraph of his said will were not payable until after her death.

[fol. 59] Evelyn P. Bull, the widow, died on the 22nd day of July, 1927.

Petition is now made to reopen prior claims for refund and abatement, which were only partially allowed in the Commissioner's letter of May 27th, 1924, in order to permit the executor to make claim for additional refund for items which could not be determined until the present time.

1. Refund for Additional Payments on Charitable Bequests

In the ninth paragraph of his Will decedent made certain charitable bequests payable on the death of his wife to the face amount of $132,000.00. In Schedule K of the original return for federal estate tax attention was called to the following language in paragraph "9" of decedent's will:

"In case the appraised value of my estate at the time of my death, after payment of all Inheritance taxes, both State and Federal, shall amount to at least $2,000,000.00, then in such case, I give and bequeath to each of the charitable organizations and institutions named in this 9th paragraph of my will, double the amount named to each."

The appraised value of the said estate did amount to at least $2,000,000.00 and the amount payable for charitable

bequests under the ninth paragraph, therefore, became the sum of $264,000.00.

In the letter of the Commissioner to the executor dated May 27, 1924 (MT-ET-809-CL.-A.R.-PEM) charitable, public and similar bequests were allowed to the amount of $136,085.46. On July 22nd, 1927, as already stated, Evelyn P. Bull, the widow, died. Thereupon the charitable be- [fol. 60] quests set forth in the ninth paragraph of the will became payable. The Executor accordingly has made payment of these bequests, they being twelve in number and the final payment was only concluded last week. These bequests as paid amounted to $264,000.00.

Executor respectfully petitions that the said sum of $127,914.54 be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

2. Refund for Additional Payments for Administration Expenses

In the claim for abatement verified August 10, 1921, referring to Schedule "H" of the original return for federal estate taxes, the executor reserved the right to claim additional deduction from the corpus of the estate for additional administration expenses such as executor's commissions, counsel fees, surrogate's fees, etc. At the time of the filing of said claim for abatement these administration expenses had not been fixed and the Commissioner did not allow them for the reason that they had not then been paid. Since the said letter of the Commissioner of May 27th, 1924 additional administration expenses have been ascertained and paid to the amount of $96,592.95.

Executor respectfully petitions that the said sum of $96,592.95 be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

[fol. 61] 3. Refund for Additional Income Taxes Recently Determined by the Commissioner

In the claim for refund verified October 6th, 1922, referring to Schedule "I" of the original return for federal estate taxes, the executor reserved the right to claim an additional refund on account of income taxes assessed for the years 1917, 1918, 1919 and 1920. Since the filing of

Claim for Refund (October 6, 1922) and the Commissioner's verification thereof (May 27th, 1924), additional assessments of income tax have been made by the Commissioner for those years, and the executor has paid such additional income tax assessments in the amount of $53,326.93.

Executor respectfully petitions that the said sum of $53,326.93 be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

4. Claim for Refund Growing Out of Recent Decision of Board of Tax Appeals Affecting the Item of $200,117.09 Heretofore Taxed by the Commissioner as Corpus and Now Retaxed by Order of Board of Tax Appeals as Income.

In his letter of May 27th, 1924 the Commissioner ruled that an item, $200,117.09, belonged to the corpus of the estate and not the income and included it among the items of "Other Miscellaneous Property" in determining the total of the undivided interest in the partnership of A. H. Bull & Co. at $235,202.99. The executors, accordingly, paid the said federal estate taxes as assessed by the Commissioner. The Commissioner in his deficiency letter to the [fol. 62] executor in the matter of the income tax return, which letter was dated July 10, 1925 (IT-PA-2-60-D. LVH-201) contrary to his previous determination assessed this same $200,117.09 for income taxes as income. The Board of Tax Appeals, upon an appeal to it, decided on August 8, 1927 that said item of $200,117.09 should be assessed as income and upheld the Commissioner in the ruling set forth in his said deficiency letter of July 10th, 1925, and entered a deficiency judgment on November 3rd, 1927.

Executor respectfully petitions that the said sum of $200,117.09 be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

5. Additional Insurance Claims Paid on the Steamships Dorothy and Beatrice.

In the claim for abatement verified August 10, 1921, in referring to additions to Schedule "I" as originally returned in the return for federal estate taxes, reference was made to the insurance of steamships by the decedent.

At the time of the filing of the said claim for abatement the amount of these risks which had been assumed by the decedent were estimated. It was not possible at that time to state them accurately, since the underwriter's adjustment had not been completed. In addition to the estimated amount set up in said claim for abatement there have since been paid additional claims to the amount of $9,234.71.

Executor respectfully petitions that the said sum of $9,234.71 be allowed as a deduction from the net estate for [fol. 63] tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

Summary

The executor and petitioner claims deductions from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924 as follows:

Net estate as taxed by Commissioner		$3,066,419.82
Total amount of deduction therefrom as herein petitioned for:		
For charitable bequests	$127,914.54	
For administration expenses	96,592.95	
For additional income taxes	53,326.93	
For Tax Board decision	200,117.09	
For additional insurance	9,234.71	
		$487,186.22
Balance net estate for tax as herein petitioned for		$2,579,233.60

The total tax assessable upon the net estate at a valuation of $2,579,233.60 as herein petitioned for would result in an estate tax of $242,592.70.

Leaving an overpayment on account of federal estate tax of $69,534.47.

Executor and petitioner respectfully prays that the prior claim for refund heretofore allowed be reopened so as to permit the further refund of the said sum of $69,534.47.

In view of the death of the widow, Evelyn P. Bull, this estate is now ready to be closed and distributed to the heirs except for the final determination and adjustment of these taxes. Petitioner, therefore, respectfully requests a personal conference in order that the matters herein set forth may be further explained and additional data and briefs

[fol. 64] submitted, and the final tax to be paid determined, in order that the executor may promptly close the estate.

Ernest M. Bull.

Sworn to and subscribed before me this 18th day of November, 1927. Annete E. Graham, Notary Public. Kings County No. 77. New York County No. 92. Commission expires Mar. 30, 1928. (Seal.)

Conover English, Esquire, 765 Broad Street, Newark, N. J., Counsel for Estate Archibald H. Bull.

[fol. 65] EXHIBIT "F" TO PETITION

In re Estate of Archibald H. Bull

Ernest M. Bull, Executor, 40 West Street, New York City, New York

MT-ET-809-CL-A.R.-PEM.

Petition to Re-open Prior Claim for Refund Additional Affidavit

STATE OF NEW YORK,
County of New York, ss:

Ernest M. Bull, being duly sworn according to law, upon his oath deposes and says:

I make this affidavit as supplemental and additional to the petition to re-open prior claim for refund verified November 18th, 1927.

That petition for refund prayed that the prior claim for refund heretofore allowed be re-opened so as to permit the further refund of the sum of $69,534.47 based upon five (5) separate items set forth in said petition.

I supplement the evidence with respect to the said separate items as follows:

1. Refund for Additional Payments on Charitable Bequests

In his last will and testament the said Archibald H. Bull, by the 9th paragraph of said will provided as follows:

Ninth. Subject to the life interest of my said wife, Evelyn [fol. 66] P. Bull, I give and bequeath the following sums of

money to the following charitable organizations and institutions, provided the appraised value of my estate at the time of my death, after the payment of all inheritance taxes, both State and Federal, shall amount to at least $1,000.000.

(a) To the Young Men's Christian Association, of Elizabeth, New Jersey, $25,000 for its Endowment Fund.

(b) To the Elizabeth Orphan Asylum, of Elizabeth, New Jersey, $25,000.

(c) To the Home for Aged Women, of Elizabeth, New Jersey, $25,000 which sum I hope the managers of said Home will use to start a fund for a new building.

(d) To the Third Presbyterian Church, of Elizabeth, New Jersey, $15,000.

(e) To the Charity Organization Society, of Elizabeth, New Jersey, $10,000.

(f) To the Visiting Nurse Association, of Elizabeth, New Jersey, $10,000.

(g) To the Trustees of the State Association of The Young Men's Christian Association of the State of New Jersey, a corporation, for the benefit of the Wawayanda Boys' Camp, $5,000.

(h) To the Elizabeth Rescue Mission, of Elizabeth, New Jersey, $1,000.

(i) To the Egenolf Day Nursery, of Elizabeth, New Jersey, $1,000.

(j) To the Board of Foreign Missions of The Presbyterian Church, $5,000.

[fol. 67] (k) To the Board of Home Missions of the Presbyterian Church, said money to be used for work of said Board in Porto Rico, $5,000.

(l) To the Board of Ministerial Relief of the Presbyterian Church and Sustentation Fund of the Presbyterian Church, $5,000.

In case the appraised value of my estate at the time of my death, after the payment of all Inheritance Taxes both State and Federal, shall amount to at least $2,000,000 then and in such case, I give and bequeath to each of the chari-

table organizations and institutions named in this ninth paragraph of my will double the amount named to each."

The appraised value of his said estate, after the payment of all inheritance taxes, both State and Federal, did in fact amount to at least $2,000,000. The result was that the legacies specified in the said 9th paragraph became payable in double the amount named. These legacies thus became payable in the total amount of $264,000. As additional evidence that said sum of money was paid on said legacies I attach hereto as Schedules Nos. 1 to 12 inclusive, a true copy of each of the receipts signed by each of said charities for the amount bequeathed to each under the said 9th paragraph of the said will, and offer to produce the original of said receipts for inspection, the aggregate of said receipts being $264,000.

Reference is hereby made to the Commissioner's letter to the Executor, dated May 27, 1924, wherein charitable, public and similar bequests are determined on review and allowed to the amount of $136,085.46, leaving a further sum of [fol. 68] $127,914.54 (the aggregate of these two items being $264,000.00) which should be allowed as a deduction from the net estate for tax as fixed by the Commissioner in his said letter of May 27, 1924.

2. Refund for Additional Payments for Administration Expenses

The executor petitions that the amount of $96,592.95 be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924. This total of $96,592.95 is made up as follows:

"E. D. Mulford, appraising property	$50.00
E. W. Phares, appraising property	82.00
C. N. Codding, Surrogate fee	1,386.00
McCarter & English, legal fees and expenses	15,074.95
Ernest M. Bull, balance of executor's fee	40,000.00
Evelyn P. Bull, balance of executor's fee	40,000.00
	$96,592.95"

As further evidence of the payment of said monies I attach hereto as Schedule No. 14 a copy of receipted bill of E. D. Mulford for $50.00, and as Schedule No. 15, a copy of

the receipted bill of E. W. Phares for $82.00; also as Schedule No. 16, a copy of receipted bills of C. N. Codding, Surrogate, for $1,386. I also attach as Schedule No. 17, a copy of the decree of the Union County Orphans Court dated April 3rd, 1925, ordering payment of legal fees and expenses to Messrs. McCarter & English to the amount of $15,074.95 and allowing to the Executors the sum of $80,000, [fol. 69] as and for balance of their commission. I also attach as Schedule No. 18, a copy of receipted bill of said McCarter & English for said $15,074.95, and as Schedules Nos. 19 and 20 copy of receipted bills of the then executors, Evelyn P. Bull and Ernest M. Bull, in the amount of $40,000 each. I herewith offer to produce the original of said receipts and certified copy of said decree of the Union County Orphans Court.

3. Refund for Additional Income Taxes Recently Determined by the Commissioner

The executor petitions that the amount of $53,326.93 be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924. This total is made up as follows:

"Additional 1917 Income Taxes		$31,770.11
Additional 1918 Income Taxes	22,018.78	
Additional 1919 Income Taxes	37,521.20	
	59,539.98	
Less Overassessment, 1/1/20-2/13/20	38,217.46	21,322.52
Additional 1919 Income Taxes		234.30
		$53,326.93"

Payment of these monies can be verified from the records of the Department and I herewith offer to produce for inspection the original receipts for said monies from the appropriate Collectors of Internal Revenue.

[fol. 70] I also attach hereto as Schedule No. 21, copy of letter of the Commissioner dated September 5th, 1921, with respect to the additional 1919 income taxes for $234.30. I also attach as Schedule No. 22, a copy of letter of E. M. Chatterton, Deputy Commissioners, dated March 9th, 1923, with respect to the additional 1917 income taxes for $31,770.11. I also attach as Schedule No. 23, copy of letter of

J. G. Bright, Deputy Commissioner, dated July 5, 1923, together with copy of statement accompanying said letter with respect to the additional 1918 income taxes for $21,322.52.

4. Claim for Refund Growing Out of Recent Decision of Board of Tax Appeals Affecting the Item of $200,117.09 Heretofore Taxed By the Commissioner As Corpus and Now Retained By Order of Board of Tax Appeals As Income.

The petition to re-open prior claim for refund, verified November 18th, 1927, is hereby amended so as to strike from said petition Item No. 4 reading as follows:

"4. Claim for refund growing out of recent decision of Board of Tax Appeals affecting the item of $200,117.09 heretofore taxed by the Commissioner as corpus and now retaxed by order of Board of Tax appeals as income."

This item No. 4 as set forth in the said petition verified November 18th, 1927 is abandoned.

5. Additional Insurance Claims Paid On the Steamships "Dorothy" and "Beatrice"

The amount of refund claimed is $9,234.71 made up as follows:

[fol. 71] "Insurance Claim — S. S. 'Dorothy' 1/9/19 ..... $2,734.71
Insurance Claim—S.S. 'Beatrice' 11/3/19..... 6,500.00

$9,234.71"

As further evidence of the payment of said monies I attach hereto as Schedule No. 24, copy of receipted bill of A. H. Bull & Co. to Estate of A. H. Bull, dated March 24, 1924 for $2,734.71, and as Schedule No. 25, release of A. H. Bull Steamship Company to Estate of A. H. Bull, dated February 26, 1925 for $6,500.00. I herewith offer to produce the original of said receipt and said release.

Ernest M. Bull.

Sworn to and subscribed before me this 16th day of February, 1928. Annete M. Graham, Notary Public. N. Y. (Seal.)

[fol. 72] Schedule "1"

Elizabeth, New Jersey, September 29th, 1927.

Board of Home Missions of the Presbyterian Church in the United States of America hereby acknowledges receipt of the sum, of Ten Thousand ($10,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1930.

Board of Home Missions of the Presbyterian Church in the United States of America, by (Signed) Verian Banks, Treasurer.

[fol. 73] Schedule "2"

Elizabeth, New Jersey, September 30, 1927.

Egenolf Day Nursery Association, Elizabeth, New Jersey, hereby acknowledges receipt of the sum of Two Thousand ($2,000.00) Dollars from Ernest M. Bull, sole surviving executor of the estate of Archibald H. Bull, deseased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Egenolf Day Nursery Association, Elizabeth, New Jersey, by (Signed) Mariana Batjer, Treas. of Egenolf Day Nursery Assn.

[fol. 74] Schedule "3"

Elizabeth, New Jersey, September —, 1927.

Visiting Nurse Association of Elizabeth, New Jersey hereby acknowledges receipt of the sum of Twenty Thousand ($20,000) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Visiting Nurse Association of Elizabeth, New Jersey, by (Signed) Marjorie C. Brown, Treas.

[fol. 75] Schedule "4"

Elizabeth, New Jersey, September —, 1927.

Third Presbyterian Church, Elizabethtown, New Jersey hereby acknowledged receipt of the sum of Thirty Thousand ($30,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Third Presbyterian Church, Elizabethtown, New Jersey, by J. Anderson Frazer, Treas.

[fol. 76] Schedule "5"

Elizabeth, New Jersey, September —, 1927.

Elizabeth Rescue Mission & Woodyard Inc. hereby acknowledges receipt of the sum of Two Thousand ($2,000) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Elizabeth Rescue Mission & Woodyard, Inc., by Rev. Howard T. Schecklow, President.

Many, many thanks.

[fol. 77] Schedule "6"

Elizabeth, New Jersey, September 24th, 1927.

The Board of Foreign Missions of the Presbyterian Church in the United States of America hereby acknowledges receipt of the sum of Ten Thousand ($10,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

The Board of Foreign Missions of the Presbyterian Church in the United States of America, by Russell Carter, Associate Treasurer.

[fol. 78] Schedule "7"

Elizabeth, New Jersey, September 23rd, 1927.

The Trustees of the State Association of the Young Men's Christian Association of the State of New Jersey hereby acknowledge receipt of the sum of Ten Thousand ($10,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to them in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

The Trustees of the State Association of the Young Men's Christian Association of the State of New Jersey, by Chas. S. Farrell, Treas.

[fol. 79] Schedule "8"

Elizabeth, New Jersey, September 22nd, 1927.

Young Men's Christian Association of Elizabeth, N. J. hereby acknowledges receipt of the sum of Fifty Thousand ($50,000.) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Young Men's Christian Association of Elizabeth, N. J., by C. A. Corbet, Treas.

[fol. 80] Schedule "9"

Elizabeth, New Jersey, September 22, 1927.

Elizabeth Orphan Asylum Association of Elizabeth, New Jersey hereby acknowledges receipt of the sum of Fifty Thousand ($50,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, Deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Elizabeth Orphan Asylum Asssociation of Elizabeth, New Jersey, by Isabel Halsey, Treas.

[fol. 81] Schedule "10"

Elizabeth, New Jersey, November 15, 1927.

Family Welfare Society of Elizabeth, N. J., hereby acknowledges receipt of the sum of Twenty Thousand ($20,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Family Welfare Society of Elizabeth, N. J., by Hugo A. Hilyerdorff, Treas.

[fol. 82] Schedule "11"

Elizabeth, New Jersey, September 30th, 1927.

Home for Aged Women, Elizabeth, N. J., hereby acknowledges receipt of the sum of Fifty Thousand ($50,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

Home for Aged Women, Elizabeth, N. J., by Helen G. Wilson, Treas.

[fol. 83] Schedule "12"

Philadelphia, Pennsylvania, Nov. 1st, 1927.

The Presbyterian Board of Ministerial Relief and Sustentation hereby acknowledges receipt of the sum of Ten Thousand ($10,000.00) Dollars from Ernest M. Bull, sole surviving executor of the Estate of Archibald H. Bull, deceased, as payment in full of the bequest made to it in the ninth paragraph of the will of the said Archibald H. Bull, probated in the office of the Surrogate of Union County, New Jersey, February 26th, 1920.

The Presbyterian Board of Ministerial Relief and Sustentation, by John H. Gross, Treasurer. (Seal.)

[fol. 84] Schedule "14"

Check 4250.

E. D. Mulford, Real Estate Expert, 286 North Broad St., Elizabeth, N. J.

September 22d, 1922.

McCarter & English, Attorneys, to E. D. Mulford:

To services rendered in submitting report of opinion of value of property of A. H. Bull Estate located on West Jersey St. and Edgar Place, Elizabeth, N. J. to Thomas G. Lawler, $50.

Received payment with thanks,

E. D. Mulford.

Sept. 26th, 1922.

[fol. 85] Schedule "15"

Elwood W. Phares, Insurance in All Its Branches, Real Estate Broker, 225 Broad Street

Elizabeth, N. J., October 6th, 1922.

Messrs. McCarter & English, Prudential Building, Newark, N. J.:

Date, ——.
Company and Number, ——.

Property covered	Premium
For services in connection with the appraisal of property situated 224-226 Edgar Place, 232-234 Edgar Place, and 221-241 West Jersey St., Elizabeth, N. J. Owned by the Estate of A. H. Bull	$82.00

Paid Oct. 10, 1922. E. W. Phares, per I. M. D.

[fol. 86] Schedule "16"

Elizabeth, N. J., April 6, 1925.

Estate of Archibald H. Bull, in account with Charles N. Codding, Surrogate of the County of Union:

All fees are now received and collected for the sole use of the county and papers cannot be filed or recorded or copies furnished until fees are paid.

Fees on accounting, decree, recording, &c	1,379.90
Advertising and posting	5.60
	1,385.50

Rec'd payment.

Charles N. Codding. B.

Check 4320.

[fol. 87] Schedule "16a"

Elizabeth, N. J., March 31st, 1925.

Estate of Archibald H. Bull, Deceased, McCarter & English, Proctors, in account with Charles N. Codding, Surrogate of the County of Union:

All fees are now received and collected for the sole use of the county and papers cannot be filed or recorded or copies furnished until fees are paid.

1 testamentary certificate, 50 cents.

Rec'd payment.

Charles N. Codding.

Check 4320.

[fol. 88] State of New Jersey,
Union County Surrogate's Court:

I, George H. Johnston, Surrogate and ex-officio Clerk of the Orphans' Court of the said County of Union, do hereby certify that I have compared the annexed copy of the decree allowing account in the Matter of the Estate of Archibald H. Bull, late of the county and State aforesaid, deceased, with the original thereof now remaining in this office, and have found the same to be a correct transcript thereof, and of the whole of such record.

Witness my hand and steal of office, this eighth day of February, in the year of our Lord one thousand nine hundred and twenty eight.

(Signed) George H. Johnston, Surrogate and Clerk of the Orphans' Court of Union County, N. J.
(Seal.)

[fol. 89] Schedule "17"

UNION COUNTY ORPHANS' COURT, JANUARY TERM, 1925

In the Matter of the Estate of ARCHIBALD H. BULL, Deceased

DECREE

The Surrogate having audited and stated the second account of Ernest M. Bull and Evelyn P. Bull, Executors and Trustees under the last Will and Testament of Archibald H. Bull, deceased, the said second accounting being the final accounting of said Ernest M. Bull and Evelyn P. Bull as executors; and placed the same on the files of his office twenty days previous to the Third day of April, 1925, and having on the day last aforesaid, reported the same to this Court for allowance and settlement and it having been proved to the satisfaction of the court that notice of their intention to settle the said account on the third day of April, A. D. 1925, in this court was given by said accountants, according to law, and application being made on due notice for the allowance of commissions and counsel fees, and the court having examined the said account and the vouchers, receipts for payments and disbursements claimed thereunder, and having found the same to be correct in all particulars, and no exceptions being made thereto.

It is, on this Third day of April, A. D. 1925, by the Orphans' Court of the County of Union and State of New [fol. 90] Jersey, ordered, adjudged and decreed that the said account be in all things allowed as reported, and that there is a balance remaining in the hands of said accountants amounting to $3,027,116.24; and that out of said balance, said executors be and they are allowed the sum of $80,000.00 as and for the balance of their commissions as executors as aforesaid, and that a counsel fee of $15,000.00 be allowed to Messrs. McCarter & English, proctors for said accountants, besides the sum of $74.95 actual disbursements incurred by them.

And it is further ordered that the said Executors and Trustees do further pay out of said balance in their hands Surrogate's fees amounting to $1,385.50.

And it appearing that in and by his said last will and testament, the said Archibald H. Bull did give, devise and

bequeath all the rest, residue and remainder of his estate unto his wife, Evelyn P. Bull, and his son, Ernest M. Bull, in trust, and did constitute and appoint said Evelyn P. Bull and Ernest M. Bull trustees for the said trust created under his said will, for the residue of his estate.

It is further ordered that out of the aforesaid sum of $3,027,115.24, after deducting therefrom the amount of commissions, counsel fees and disbursements, and surrogate's fees hereinbefore allowed, there remains a balance of $2,930,655.79 to be distributed according to the terms of the said will.

It is further ordered that the said executors do turn over to the said trustees named in said will, the said balance of $2,930,655.79 to be administered by said trustees according to the terms of the said will.

Alfred A. Stein, Judge.

[fol. 91] Schedule "18"

5285. April 29, 1925.

Received of Estate A. H. Bull Fifteen Thousand and Seventy Four 95/100 Dollars Counsel's fees $15,000. Disbursements $74.95—settlement of affairs of estate.

McCarter & English.

$15,074.95.

Schedule "19"

5291. June 22, 1925.

Received of Estate A. H. Bull Forty Thousand 00/100 Dollars Executors' fees as allowed under decree Union County Orphans Court Jan. 1925.

Ernest M. Bull, Executor.

$40,000.00.

Schedule "20"

June 22, 1925.

Received of Estate Archibald H. Bull Forty Thousand 00/100 Dollars Executors Fees under decree Orphans Court a/c Evelyn P. Bull.

Ernest M. Bull, Attorney in Fact.

$40,000.00.

[fol. 92] Schedule "21"

September 5, 1921.

IT-G-FAR-P-AGB.

Mr. Ernest M. Bull, Executor, Estate of A. M. Bull, deceased, 17 Battery Place, New York, N. Y.

SIR:

An examination has been made of the claim filed by the above named decedent for the abatement of $16,662.41, additional income tax for 1916 and of the claim filed by you as executor for the estate of the above-named decedent for the credit of $16,662.41 to be applied against the unpaid balance of the assessment for 1919.

The additional tax having been paid and as the claim for the credit supersedes the claim for abatement of $16,662.41 the claim for abatement is therefore rejected.

The claim for credit is based upon the statement that stock dividends received from the A. H. Bull Steamship Company are not taxable and that the assessment of tax thereon is illegal.

In a reinvestigation of your books and accounts by a revenue agent the stock dividends were eliminated, however, other differences were found which decreased the overpayment by $234.00 as follows:

Interest on notes $1,430.20 was transferred from Column A to Column B no tax on this amount having been paid at source and expenses were found to — overstated $2,000.00. The adjustment of interest on notes indicates a [fol. 93] difference of $14.30 and the adjustment of expenses indicates a difference of $220.00 (2% normal tax and 9% surtax) or a total of $234.30.

Your claim for credit will therefore be allowed for $16,428.11 and rejected for $234.30 in the next schedule to be approved.

Respectfully, —— ——, Commissioner.

[fol. 94] Schedule "22"

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

IT-PA-FR-DA-709.

Mar. 9, 1923.

Mr. Ernest M. Bull, Executor, Estate of Archibald H. Bull,
40 West St., New York, N. Y.

SIR:

An examination of the income tax return of Archibald H. Bull, deceased, for the year 1917 and of his books of account and records, taking into consideration the statement contained in your letter of March 18, 1922, and the facts disclosed at a conference with your representative, Mr. Conover English and yourself, discloses an additional tax liability for that year of $31,770.11 instead of $61,300.72, as recommended by the revenue agent. The verification of his tax liability has been reviewed and approved by this office with the following exceptions:

The Revenue Agent included in Block "A" the amount of $105,833.90, which represented income in the form of insurance premium whereas the actual amount received in 1917 was $54,620.99, and the balance received in the years prior thereto.

As a result of this adjustment there is indicated an additional tax of $21,770.11 instead of $61,300.72.

[fol. 95] With reference to the assessment of excess profits tax on Block "A" you are advised that the same has been reduced from $9230.75 to $5133.72 representing 8% on income from business in which no invested capital was employed. You will be advised as to the result of the examination for the years subsequent to 1917 in a future communication.

You are advised that in order that the collection of this tax may not be jeopardized by the delay incident to the giving of the usual thirty days notice, as provided for in Section 250 (d) of the Revenue Act of 1921, an immediate assessment by the Commissioner of Internal Revenue will be made.

The Bureau will, however, entertain a claim in abatement if an appeal is filed within thirty days from the receipt of this letter. The appeal attached to the claim should be filed with the Collector of your district and be under oath setting forth in full all information upon which you base your protest and should be addressed to the Commissioner of Internal Revenue for the specific attention of IT-PA-FR-DA-709. On request a conference will be arranged prior to final decision.

If appeal is not filed, payment should be made upon receipt of notice and demand from the collector of Internal Revenue for your district.

Respectfully, (S) E. M. Chatterton, Deputy Commissioner.

[fol. 96] Schedule "23"

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

IT-PA-FR-DA-709.

Jul. 5, 1923.

Mr. Ernest M. Bull, Executor, Estate of Archibald H. Bull, 40 West Street, New York, N. Y.

SIR:

An examination of your income tax returns and of your books of account and records for the years 1918, 1919, 1920 discloses an additional tax liability for the years 1918 and 1919 aggregating $59539.98 and overassessments for the period 1/1/20-2/12/20 amounting to $38217.46 as shown in detail in the attached statement.

In accordance with the provisions Section 250 (d) of the Revenue Act of 1921, you are granted thirty days within which to file an appeal and show cause or reason why this tax or deficiency should not be paid. No particular form of appeal is required, but if filed it must set forth specifically the exceptions upon which it is taken, shall be under oath, contain a statement that it is not for the purpose of delay, and the facts and evidence upon which you rely must be fully stated. The appeal, if filed, must be addressed to [fol. 97] the Commissioner of Internal Revenue, Washing-

ton, D. C., for the specific attention of IT-PA-FR-DA-709, and will be referred to the Income Tax Unit before transmittal to the agency designated for the hearing of such appeals.

You may, if you desire, request a conference before the Income Tax Unit in connection with the appeal, to be held within the period prior to the expiration of five days after the time prescribed for the filing of the appeal. If the Income Tax Unit is unable to concede the points raised in your appeal, it will be transmitted, together with the recommendation of the Income Tax Unit, to such agency as the Commissioner may designate for final consideration.

Where a taxpayer has been given an opportunity to appeal and has not done so, as set forth above, and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement of the assessment will be entertained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Respectfully, (S) J. G. Bright, Deputy Commissioner.

[fol. 98] Statement

IT-PA-FR-DA-709.

In re Mr. Ernest M. Bull, Executor, Estate of Archibald H. Bull, 40 West Street, New York, N. Y.

Year	Additional tax	Overassessment
1918	$22,018.78	Paid by credit 1920 over assessment letter 2/21/24.
1919	37,521.20	$16,198.68 pd. by credit 1920 assessment letter 2/21/24; $21,322.52 pd. by check 4/16/24.

Period 1/1/20 to 2/13/20, $38,217.46.

The verification of your tax liability for the years 1918 and 1919 and the period of January 1, 1920 to February 13, 1920 as indicated by the Revenue Agent's Report dated

February 24, 1922, has been reviewed and approved by this office with the amendments recommended in the supplemental report dated May 31, 1923.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district. If the tax question has not been paid, the amount will be abated by the Collector. If the tax has been paid the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to [fol. 99] you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded since a portion may be an assessment which has been entered but not paid.

Schedule "24"

New York, March 24, 1924.

Estate of A. H. Bull,

To A. H. Bull & Co., Dr.
Ship Brokers and Steamship Agents,
40 West Street.

S. S. "Dorothy" collision.
Voyage, ——

S. S. "Dorothy" collision with barge "Northern" No. 7 at Cardenas, Cuba, September 9th, 1919.

Total claim per Adjuster's statement	$18,231.39
¾ applicable to English Form Hull Policies	13,673.54
20% carried by A. H. Bull	2,734.71

Received Payment, A. H. Bull & Co., A. Role.

March 26, 1924.

[fol. 100] Schedule "25"

General Release

To All to Whom These Presents Shall Come or May Concern:

Greetings: Know ye, that A. H. Bull Steamship Co., a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and having its prin-

cipal office and place of business at No. 40 West Street, New York City, N. Y., for and in consideration of the sum of Six Thousand Five Hundred Dollars ($6,500.00), lawful money of the United States of America, to it in hand paid by the Estate of A. H. Bull the receipt whereof is hereby acknowledged, has remised, released and forever discharged and by these presents does for itself, its successors and assigns and each of them, remise, release and forever discharge the said Estate of A. H. Bull, its successors and assigns, and each of them, the several steamships running in the lines of the said Company, their officers and crews, their heirs, executors and administrators, and in particular the steamship "Beatrice," her master, officers, crews, charterers and agents, of and from all, and all manner of action and actions, cause and causes of action, suits, debts, liens, dues, sums of money, accounts, bonds, bills, controversies, agreements, trespasses, damages, judgments, executions, claims and demands whatsoever, whether at law or in admiralty, which against said A. H. Bull Steamship Co. or against any steamship thereof or running in its said lines or against said steamship "Beatrice" or any agent or person connected therewith it ever had, now has [fol. 101] or which it or its successors or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of these presents for all claims and demands for loss, damage, injury and/or shortages arising from or in connection with fire which occurred on or about November 3rd, 1919.

In witness whereof the said A. H. Bull Steamship Co. has caused its corporate seal to be hereunto affixed and these presents to be signed by its Ass't Secretary this 26th day of February in the year one thousand nine hundred and twenty-five.

A. H. Bull Steamship Co., Edward B. Wright, Ass't Secty.

Sealed and delivered in presence of A. Nole. (Seal.)

[fol. 102] State of New York,
City of New York, ss:

On this 26th day of February nineteen hundred and twenty-five before me came E. B. Wright to me known, who being by me duly sworn, did depose and say that he re-

sides in Montclair, N. J., that he is the Ass't Secretary of The A. H. Bull Steamship Co., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

Annette E. Graham, Notary Public. Kings County No. 46. New York County No. 80. – Commission expires Mar. 30, 1928. (Seal.)

———

[fol. 103] EXHIBIT "G" TO PETITION

(Execute separate form for each tax period)

Claim for Refund of Taxes Illegally Collected

STATE OF NEW YORK,
County of New York, ss:

Ernest M. Bull, Ex'r Estate Archibald H. Bull, 33 Prospect Avenue, Montclair, New Jersey, 40 West Street, New York City, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: ——.

2. Character of assessment or tax: Estate.

3. Amount of assessment or stamps purchased: $——.

4. Reduction of Tax Liability requested (Income and Profits Tax): $——.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable), $41,517.45.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): June 18, 1921 and Aug. 11, 1921.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: 5th District of New Jersey.

[fol. 104] 9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $——.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

See affidavit of Ernest M. Bull and Schedule annexed.
Should further information be desired, advise the counsel of the Estate: Conover English, Esquire, 765 Broad Street, Newark, New Jersey.
See Commissioner's file MT-ET-809-CL-AR-PEM.
(Attach additional sheets if necessary.)

(Signed) Ernest M. Bull.

Sworn to and subscribed before me this 13th day of April, 1928. Annete E. Graham, Notary Public.

[fol. 105] AFFIDAVIT OF ERNEST M. BULL

STATE OF NEW YORK,
County of New York, ss:

ERNEST M. BULL, being duly sworn according to law, upon his oath deposes and says:

I am the sole surviving executor of the Estate of Archibald H. Bull, late of Elizabeth, New Jersey, who died February 13th, 1920.

On or about August 10th, 1921 payment was made to the Internal Revenue Collector for the 5th District of New Jersey of the sum of $336,264.66 as payment of the estate tax upon the return for Federal estate tax theretofore filed by said Estate of Archibald H. Bull.

On or about said August 10, 1921 a claim for abatement in the sum of $83,329.65 was filed.

On or about October 6th, 1922, a claim for refund in the sum of $166,428.60 was filed.

Thereafter and on or about May 27th, 1924 (as appears from a letter of the Commissioner of that date to the Executor) the said tax was adjusted and the said claim of abatement was allowed in the sum of $83,329.03 and rejected in the sum of $0.62; and the said claim of refund was allowed in the sum of $24,138.11 and rejected in the sum of $142,290.49.

At the time of the filing of the original return and also at the time of the filing of the claims for abatement and refund the widow of Archibald H. Bull, Evelyn P. Bull, was living.

Under the terms of the will of Archibald H. Bull and income of the residue of the estate was payable to his said widow and certain charitable bequests set forth in the ninth paragraph of his said Will were not payable until after her death.

Evelyn P. Bull, the widow, died on the 22nd day of July, 1927.

[fol. 106] Schedule "K" to Original Return

In his last will and testament the said Archibald H. Bull, by the 9th paragraph of his said will, provided as follows:

"Ninth. Subject to the life interest of my said wife, Evelyn P. Bull, I give and bequeath the following sums of money to the following charitable organizations and institutions, provided the appraised value of my estate at the time of my death, after the payment of all inheritance taxes, both State and Federal, shall amount to at least $1,000,000.

(a) To the Young Men's Christian Association of Elizabeth, New Jersey, $25,000 for its Endowment Fund;

(b) To the Elizabeth Orphan Asylum of Elizabeth, New Jersey, $25,000.

(c) To the Home for Aged Women, of Elizabeth, New Jersey, $25,000 which sum I hope the Managers of said Home will use to start a fund for a new building.

(d) To the Third Presbyterian Church of Elizabeth, New Jersey, $15,000.

(e) To the Charity Organization Society, of Elizabeth, New Jersey, $10,000.

(f) To the Visiting Nurse Association, of Elizabeth, New Jersey, $10,000.

(g) To the Trustees of the State Association of The Young Men's Christian Association of the State of New Jersey, a corporation, for the benefit of the Wawayanda Boys' Camp, $5,000.

[fol. 107] (h) To the Elizabeth Rescue Mission, of Elizabeth, New Jersey, $1,000.

(i) To the Egenolf Day Nursery, of Elizabeth, New Jersey, $1,000.

(j) To the Board of Foreign Missions of the Presbyterian Church, $5,000.

(k) To the Board of Home Missions of the Presbyterian Church, said money to be used for work of said Board in Porto Rico, $5,000.

(l) To the Board of Ministerial Relief of the Presbyterian Church and the Sustentation Fund of the Presbyterian Church, $5,000.

In case the appraised value of my estate at the time of my death, after the payment of all inheritance taxes both State and Federal, shall amount to at least $2,000,000, then and in such case, I give and bequeath to each of the charitable organizations and institutions named in this ninth paragraph of my will, double the amount named to each."

The appraised value of his said estate, after the payment of all inheritance taxes, both State and Federal, did in fact amount to at least $2,000,000. The result was that the legacies specified in the said 9th paragraph become payable in double the amount named. These legacies thus became payable in the total amount of $264,000 and the executor did, following the death of the widow, make payment of said legacies in said sum of $264,000.

In the Commissioner's letter to the Executor, dated May 27th, 1924 charitable, public and similar bequests are determined on review and allowed to the amount of $136,085.46, leaving a further sum of $127,914.54 (the aggregate [fol. 108] of these two items being $264,000.00) which should be allowed as a deduction from the net estate for tax as fixed by the Commissioner in his said letter of May 27th, 1924.

Schedule "I" to Original Return Referring Particularly to Federal Income Taxes

In the claim for refund certified October 6th, 1922, referring to Schedule I of the original return for federal estate taxes, the executor reserved the right to claim an additional refund on account of income taxes assessed for the years 1917, 1918, 1919 and 1920. Since the filing of Claim for Refund (October 6, 1922) and the Commissioner's verification thereof, (May 27th, 1924) additional assessments of income tax have been made by the Commissioner for those years, and the executor has paid such additional income tax assessments in the amount of $53,326.93.

The sum of $53,326.93 should be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924. This total is made up as follows:

"Additional 1917 Income Taxes		$31,770.11
Additional 1918 Income Taxes	$22,018.78	
Additional 1919 Income Taxes	37,521.20	
	59,539.98	
Less Overassessment 1/1/20-2/13/20	38,217.46	
		21,322.52
Additional 1919 Income Taxes		234.30
		$53,326.93"

Schedule H of Original Return

Reference is made particularly to Executor's commissions, counsel fees and surrogate's fees, as mentioned in [fol. 109] "Additional items to Schedule H of Original Return", set up in the claim for abatement verified August 10th, 1921.

In the claim for abatement verified August 10, 1921, referring to Schedule "H" of the original return for federal estate taxes, the executor reserved the right to claim additional deduction from the corpus of the estate for addi-

tional administration expenses such as executor's commissions, counsel fees, surrogate's fees, etc. At the time of the filing of said claim for abatement these administration expenses had not been fixed and the Commissioner did not allow them for the reason that they had not then been paid. Since the said letter of the Commissioner of May 27th, 1924 additional administration expenses have been ascertained and paid to the amount of $96,592.95.

This total of $96,592.95 is made up as follows:

"E. D. Mulford, appraising property	$50.00
E. W. Phares, appraising property	82.00
C. N. Codding, Surrogate Fee	1,386.00
McCarter & English, legal fees and expenses	15,074.95
Ernest M. Bull, balance of executor's fee	40,000.00
Evelyn P. Bull, balance of executor's fee	40,000.00
	$96,592.95"

The said sum of $96,592.95 should be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

Schedule "I" to Original Return

Reference is made particularly to the claim for insurance on Steamships as mentioned in "Additions to Schedule I as originally returned", set up in the claim for abatement verified August 10, 1921.

[fol. 110] At the time of the filing of the said claim for abatement the amount of these risks which had been assumed by the decedent were estimated. It was not possible at that time to state them accurately, since the underwriter's adjustment had not been completed. In addition to the estimated amount set up in said claim for abatement there have since been paid additional claims to the amount of $9,234.71.

This sum of $9,234.71 is made up as follows:

"Insurance Claim—S. S. "Dorothy" 1/9/19	$2,734.71
Insurance Claim—S. S. "Beatrice" 11/3/19	6,500.00
	$9,234.71

The said sum of $9,234.71 should be allowed as a deduction from the net estate for tax as fixed by the Commissioner of Internal Revenue in his letter dated May 27th, 1924.

Annexed hereto and made a part hereof is a Schedule showing the deductions claimed as the basis for the refund of $41,517.45.

Sworn to and subscribed before me this 13th day of April, 1928. Annette E. Graham, Notary Public, Kings County No. 19. New York County No. 96. Commission expires Mar. 30, 1930. (Notarial Seal.)

[fol. 111] SCHEDULE "26"

Net amount of Estate for tax as fixed by the Commissioner in his letter of May 27th, 1924		$3,066,419.82
Deductions—		
Deductions from Schedule K to original return referring to charitable bequests	$127,914.54	
Deductions from Schedule I to original return referring to federal income taxes	53,326.93	
Deductions from Schedule H of original return referring to executor's commissions, counsel fees, surrogate's fees	96,592.95	
Deductions from Schedule I to original return referring to insurance on steamships	9,234.71	
Revised net amount of Estate		$287,069.13
		$2,779,350.69
Taxes paid		$312,126.55
Corrected amount of Tax		$270,609.10
Amount of Refund		$41,517.45

[fol. 112] EXHIBIT "H" TO PETITION

Treasury Department, Internal Revenue Service

Form 843—Jan., 1922

Comptroller General U. S.

January 18, 1922.

Claim for Refund of Taxes Illegally Collected

Account number ——.

Date received: Received Nov. 4th, 1922. Comptroller's Dept.

STATE OF NEW JERSEY,
County of Essex, ss:

Archibald H. Bull, 225 West Jersey St., Elizabeth, N. J., 40 West St., New York City.

This deponent, being duly sworn, according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: ——.

2. Character of assessment or tax: Estate Tax.

3. Amount of assessment or stamps purchased: $——.

4. Reduction of Tax Liability requested (Income and Profits Tax): $——.

5. Amount to be abated: $——.

6. Amount to be refunded (or such greater amount as is legally refundable): $166,428.60.

[fol. 113] 7. Dates of payment (see Collector's receipts or indorsements of canceled checks): ——.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: 5th District of New Jersey.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: $166,428.60.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

See affidavit of Ernest M. Bull and schedules annexed. Should further information be desired please advise McCarter & English, #765 Broad St., Newark, New Jersey, attorneys of the estate.

(Signed) Ernest M. Bull.

Sworn to and subscribed before me this 6th day of October, 1922. Edith S. Powelson, Notary Public for New Jersey. (Seal.)

[fol. 114] AFFIDAVIT OF ERNEST M. BULL

STATE OF NEW JERSEY,
County of Essex, ss:

Ernest M. Bull, being duly sworn according to law, upon his oath, deposes and says:

I am one of the Executors of the Estate of Archibald H. Bull, and am the active executor in charge of said estate.

On or about August 10, 1921, payment was made to the Internal Revenue Collector for the 5th District of New Jersey of the sum of $336,264.66 as payment of the Estate Tax upon the Return for Federal Estate Tax theretofore filed by said Estate of Archibald H. Bull.

Application is now made for a refund to the amount of $166,428.60 upon the ground that said sum of $166,428.60 represents taxes illegally collected. The grounds of said application and the items upon which application is made are as follows: reference being made to the Return for Federal Estate Tax:

1. Schedule B item 41 as follows:

"Twelve thousand five hundred and fifty shares of the A. H. Bull Steamship Company, 17 Battery Place, N. Y. C. common par $100 at 250—unlisted ..... $3,137,500."

The value of $250 per share of the stock of the A. H. Bull Steamship Company set up in the Return and upon which the tax was paid, was taken as the supposed market value of the stock at the date of the decedent's death on February 13, 1920. No analysis of the books had been made at that time. The stock was and still is inactive and the valuation of $250 per share is now proved to have been erroneous.

[fol. 115] Upon a similar Return filed with the Comptroller of the State of New Jersey, deponent is advised that the said Comptroller refused to accept said valuation of $250 per share, as correct, and placed a lower valuation on the stock. Neither deponent nor his attorneys are permitted, under the rules and regulations of the State Comptroller's Department, to examine the papers, no formal assessment having yet been made, but deponent has been credibly informed that the Comptroller's assessment was made upon a considerably lower valuation than $250 per share.

An analysis of the books of the A. H. Bull Steamship Company for the year 1919 shows that the book value of the stock was $161.33 per share, as of December 31, 1919, which date was about six weeks prior to decedent's death. The average book value of the stock of the Steamship Company for the years 1913 to 1920 inclusive is $138.70. Annexed hereto as Exhibit No. 1 is a copy of the condensed balance sheet of the A. H. Bull Steamship Company for the years 1913 to 1920 inclusive.

Deponent verily believes that the valuation of the stock of the A. H. Bull Steamship Company as set forth in Schedule B—item 41 should be at 161⅓ for 12,550 shares, which would reduce the valuation to $2,024,691.50 or a reduction of $1,112,808.50.

2. Schedule B—Item 47 as follows:

"3,207 shares of stock of Economical Homes Association, par value $25, @ 25, unlisted, $95.175."

The decedent, about three or four years before his death, became greatly interested in providing better living condi- [fol. 116] tions for working men and their families. He was much interested in the Charity Organization Society of Elizabeth and had visited many homes of working people, and had become convinced that much of the unrest and discontent among this class of people was caused by inadequate homes, and became convinced that it was a part of his civic duty to help provide better homes for working people.

In pursuance of this idea decedent caused to be incorporated the Economical Homes Association, to which he contributed a very large sum of money, either in cash or in property, and all of the capital of $305,000, with the exception of some $4,000 or $5,000 which was contributed by friends of the enterprise, was contributed by decedent. The Association, either directly or through decedent, acquired considerable property in different parts of the City of Elizabeth, some of which had already been built upon, and other of which was vacant land. The existing houses were either rebuilt or improved, and on a tract of land in South Elizabeth a group of thirty-six houses was erected, and on other of the property a number of two and four family houses were erected, so that room was provided for eighty-four families and one store. The buildings were of

the cheapest possible construction in order that they might rent at a minimum. The consequent result is that the depreciation of the property has been very great, the upkeep alone amounting to over five per cent of the cost. The buildings are not of a character to be salable, particularly the four-family units, as these are not a kind of property that a working man or tenant cares to buy, and the cheapness of the construction and the cost of upkeep makes all of the buildings undesirable as an investment.

[fol. 117] The decedent began the original work of construction of the houses in his own name and later, upon the organization of the Economical Homes Association, he turned over to it all of the properties which he had acquired for the purpose of carrying on this charitable work. He turned over all these properties at actual cost to him, nor did he include therein his own time nor the value of much grading, planting of lawns and work of that nature, which he supervised and had done by gardeners and men in his own employ, nor did he include the cost of a truck which he owned and which worked the greater part of the time for the Association.

At the time of decedent's death contracts were outstanding and work had been started on four additional four-family houses which have since been completed by the Association.

Upon its organization the Association rented rooms as an office in Elizabeth and decedent put in charge thereof a Mr. McClelland, who had previously been employed by A. H. Bull & Co. and who had later become crippled from disease. Under an arrangement which decedent made with A. H. Bull & Co. that company paid about two-thirds of Mr. McClelland's salary and the Association paid the balance. Mr. McClelland with the assistance of his wife kept the accounts, collected the rents and acted as agent for the property. All the officers of the Association, as well as the Directors, serve without compensation and Mr. McClelland was, and is, the sole salaried employee, except at times a stenographer, and the amount of his compensation as paid by the association only amounted to $1,200 a year.

At the time of decedent's death the rents which were being charged were unusually low. Deponent, as Executor, [fol. 118] was called upon to assume the management of the Association, and felt that by increasing the rents and han-

dling the concern as a business proposition it might be placed on a six per cent basis, after taking care of repairs and depreciation, and to that end caused a slight increase to be made in the rents, but after several years of experience it is now demonstrated that the property cannot be made to pay more than two per cent on the investment, and further that the properties are not marketable, except at a heavy loss.

The stock is valued in the Return (Schedule "B" item 47) at par. The stock is of course unlisted and inactive, and the Executors had no certain knowledge on which to estimate the value, and, desiring to err on the right side, put it in the Return at par. Annexed hereto as Exhibit No. 3 is a copy of the balance sheet as of December 31, 1919. It will be observed that the reserve for depreciation is put in at two per cent although the actual depreciation is nearer 5%. The Government allows a depreciation of three per cent. It will also be observed that a dividend of five per cent paid for the year 1919 was in excess of the earnings for that year.

Deponent verily believes that the valuation of the stock of the Economical Homes Association set forth in Schedule "B" item 47 should be at 18 for 3,207 shares, which would reduce the valuation of $57,726 or a deduction of $22,449.

Of the 3,807 shares of stock of Economical Homes Association, listed in Schedule B item 47, 600 shares of said stock were given by decedent to his daughter, Evelyn Bull McLain the Christmas prior to his death. Said 600 shares were included in the total of 3,807 shares reported in Item 47 Schedule B of the Return at $25 per share. In a claim for abatement which was verified on August 10, 1921, and [fol. 119] filed, said 600 shares of stock given to said Evelyn Bull McLain were deducted, together with the securities listed in Schedule "B," Items 37, 38, 39, 40, 43, 44, 45 and 46.

4. Schedule "D," item 6 as follows:

"6. Automobiles.
Pierce Arrow Touring Car, year 1919, $6,800."

At the time the return was made deponent inquired casually as to the value of decedent's Pierce Arrow touring car, which was a used car, and was informed $6,800 so stated

in Schedule D, item 6. On further investigations since made, he has taken the matter up with a Pierce Arrow Agency, who quoted him $5,000 for the car, and also with Lawson's Garage, Central Valley, New York, who handle high grade cars, and who have quoted him $3,000; for said car. He, therefore, verily believes that the car's valuation is about $4,000 as of the date of decedent's death and that the valuation of said car as set forth in Schedule "D" item 6 should be $4,000, or a deduction of $2,800.

5. Schedule I.

There should be added to Schedule "I" two further items as follows:

"Balance of subscription due to Elizabeth General Hospital under pledge ..... $13,000."

At the time this return was filed there had not come to the Executors' attention an item of $13,000 which should properly have been added to Schedule "I".
[fol. 120] Schedule "I" as filed totalled $421,735.80. It should be increased by $1,678.34, making a total of $441,414.14. This item of $19,678.34 is separable into two parts, and arises from the following facts:

1. An item of $13,000.

During his lifetime decedent, Mr. Bull, had agreed to contribute to the new proposal building of the Elizabeth General Hospital, of Elizabeth, N. J., the sum of $125,000. Up to the time of his death he had paid all of that pledge except $13,000. It appears from letters which he wrote to the Chairman of the Building Committee of the Hospital, and which letters were sent for the first time exhibited to the Executors after the filing of the Return, and in June, 1922, that $13,000 of the pledge had been withheld and he had agreed in writing to pay this at any time on demand. Demand was never made during his lifetime and it now constitutes a debt of the estate which the Executors must meet.

2. An item of $6,678.34.

Since the filing of the return, and also the filing of the Claim for Abatement, verified August 10, 1921, Examining Officers Frank A. Harder and H. F. Smith made an audit of the individual Income Tax Returns of the decedent for the

years 1917, 1918, 1919 and 1920, and filed their report dated December 22, 1921, in which they reported an additional assessment for the said years last mentioned of $82,967.89. The Executors acknowledge a liability for said years to the amount of $6,678.34, and they filed exceptions to so much of [fol. 121] the report as recommends an additional assessment above that amount. If, notwithstanding the exceptions, an assessment is made upon said report to the full amount of $82,967.89, a further claim will be made for taxes illegally collected upon the principal of the estate to the amount of $76,289.65.

The acknowledged liability of $6,678.34 for additional income taxes is set forth as follows:

1917	$4.30
1918	1,712.34
1919	4,820.13
1920	141.57
	$6,678.34

Deponent verily believes that said items aggregating $19,678.34 should be added to Schedule "I", which would increase the deductible item of $421,735.80 therein set forth to $441,414.14 and that appropriate refund should be made of the taxes overpaid because of the failure to have included these additional items aggregating $19,678.34. See Exhibit No. 2 for summary.

Ernest M. Bull.

Sworn to and subscribed before me this 6th day of October, 1922. Edith S. Powelson, Notary Public of New Jersey. (Seal.)

(Here follows side folio 122)

[fol. 122]

EXHIBIT 1 TO AFFIDAVIT

A. H. Bull Steamship Co.

Condensed Balance Sheet as at December 31, 1913, to 1920, Inclusive

	1913	1914	1915	1916	1917	1918	1919	1920
Assets—								
Cash	.....	.....	.....	45,000.00	150,000.00	663,248.03	412,198.76	324,761.53
Notes and Accounts Receivable	64,664.58	49,490.24	9,553.50	144,677.54	852,555.60	653,258.73	634,105.28	3,706,850.23
Investments	.....	.....	242,087.80	703,204.65	1,637,887.82	1,864,844.59	3,946,066.08	3,143,920.91
Miscellaneous Assets	5,300.84	3,424.68	1,545.00	.....	22,269.99	21,088.07	20,437.38	30,232.30
Steamers	1,678,450.00	1,816,797.03	2,471,582.76	3,195,869.03	3,412,060.16	3,415,444.26	3,415,444.26	3,415,444.26
Buildings	.....	.....	.....	.....	.....	.....	164,460.03	.....
Deferred Charges	29,013.47	41,601.41	37,036.02	74,028.17	97,933.04	146,657.04	111,504.80	111,377.77
	1,777,428.89	1,911,313.36	2,761,805.08	4,162,779.39	6,172,706.61	6,164,540.72	8,704,216.59	10,732,587.00
Liabilities—								
Notes and Accounts Payable	10,000.00	700.00	47,406.40	120,869.07	1,031,501.38	732,978.32	1,115,922.32	3,636,005.04
Reserve for Depreciation	.....	.....	50,462.95	366,953.63	626,707.42	1,466,504.74	2,170,722.59	2,236,490.75
Reserve for Taxes	.....	.....	.....	.....	722,262.08	1,090,179.11	1,025,344.86	295,806.65
Sundry Reserve	.....	.....	.....	.....	.....	.....	.....	72,465.89
Bonds	733,900.00	821,000.00	1,237,500.00	1,092,000.00	388,100.00	305,000.00	217,500.00	120,000.00
Mortgages	.....	.....	.....	.....	.....	.....	83,000.00	.....
Deferred Earnings	.....	.....	.....	.....	.....	.....	58,355.83	91,159.00
Capital Stock	876,200.00	876,200.00	1,000,000.00	2,000,000.00	2,500,000.00	2,500,000.00	2,500,000.00	2,500,000.00
Surplus	157,328.89	213,413.36	426,435.73	582,956.69	904,135.73	669,878.55	1,533,370.99	1,780,659.67
	1,777,428.89	1,911,313.36	2,761,805.08	4,162,779.39	6,172,706.61	6,764,540.72	8,704,216.59	10,732,587.00
Book Value of Stock per Share	117.95	124.36	142.64	129.15	136.15	126.80	161.33	171.22

[fol. 123] EXHIBIT 2 TO AFFIDAVIT

The following schedule shows the deductions claimed as

Net amount of Estate set forth in revised account verified Aug. 10th, 1921	$3,217,279.12
Deductions—	
Deductions to Schedule B	1,135,257.50
Deductions from Schedule D	2,800.00
Deductions through additions to Schedule I	19,678.34
Total decrease	1,157,735.84
Gross total above set forth	3,217,279.12
Deductions above set forth	1,157,735.84
	2,059,543.28
Revised net amount of Estate Taxes paid	$336,264.66
Corrected amount of tax	169,826.06
Amount of Refund	166,428.60

[fol. 124] EXHIBIT "I" TO PETITION

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-Cl-809-CTK.

District of Fifth New Jersey.
Estate of Archibald H. Bull.
Date of death—February 13, 1920.

Ernest M. Bull, et al., Executors, Estate of Archibald H. Bull, 765 Broad Street, Newark, New Jersey.

SIRS:

The Bureau has examined the application for reopening of the claim for refund filed by you and has also considered your claim for refund of $41,517.45, Federal estate tax paid by you under the provisions of the Revenue Act of 1918.

The facts of this case are as follows:

This decedent died on February 13, 1920. Payment with respect to the Federal estate tax was made on June 15, 1921,

in the amount of $250,000.62 and on August 10, 1921, in the amount of $81,264.66. On August 10, 1921, a claim for abatement of $83,329.65 was filed. On October 10, 1922, a claim for refund of $166,428.60 was filed. By Bureau letter [fol. 125] of May 27, 1924, notice was given that the claim for abatement was approved as to $83,329.03 and was rejected as to 62 cents and that the claim for refund was approved and allowed as to $24,138.11 and was rejected as to $142,290.49. No further action was taken by the representatives of the estate until November 21, 1927, when a petition to reopen the claim was filed. In connection with the petition to reopen the original claim for refund, there was filed, on April 14, 1928, a new claim for refund of $41,517.45. The new claim for refund appears to be based upon the same contentions upon which the petition to reopen the old claim is based.

The items presented in the petition for reopening were not included in the original claim for refund and only the income tax item was mentioned, reference being made to the controversy as to the amount of income tax. It was stated that if the controverted amount should be assessed, "a further claim" would be made with respect to the estate tax. Thereafter, part of the amount of income tax in controversy was assessed and paid. In the petition for reopening, refund of estate tax upon the basis of such payment of income tax is requested. Attention is called to the fact that at the time the original claim was filed, such income tax had not been assessed or paid. No part of the original claim for refund was based upon the income tax which was then in controversy but the mere statement was made that, under certain conditions, a claim would be filed in the future. Therefore, all the grounds upon which this petition to reopen is based are distinctly new grounds, which could not be considered in connection with the original claim for refund should that claim be reopened.

[fol. 126] If the contentions advanced by the estate are valid, they might support a new claim for refund filed within the time provided by law. The deduction on account of charitable bequests was authorized by the Revenue Act of 1918 and not by paragraph 3 of Subdivision (a) of Section 403 of the Revenue Act of 1921, as was assumed in the brief filed on your behalf. Therefore, the special provision with respect to refunds contained in the last paragraph of Sec-

tion 403 of the Revenue Act of 1921 does not apply to this case. Accordingly, Section 3228 of the Revised Statutes, as amended, applies to every feature of the claim. The last payment of estate tax with respect to this estate was made on August 10, 1921. The "four years next after the payment of such tax" expired August 10, 1925. The petition to reopen was filed on November 21, 1927. The new claim for refund was filed on April 14, 1928.

The original claim for refund was rejected in part on May 27, 1924. The petition to reopen sets up an entirely new and distinct claim which for refund will not be reopened. The claim for refund filed on April 14, 1928, is barred by Section 3228, as amended, and is rejected in its entirety.

Respectfully, T. R. Mires, Acting Commissioner.
DMT.

[fol. 127] EXHIBIT "K" TO PETITION

(Execute separate form for each tax period)

Claim for Refund of Taxes Illegally Collected

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

STATE OF NEW YORK,
County of New York, ss:

Estate of Archibald H. Bull, Trustee, 40 West St., New York City, N. Y.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period—From Feb. 13, 1920, to Dec. 31, 1920.

1. Business in which engaged: ——.

2. Character of assessment or tax: Income Tax and Interest.

3. Amount of assessment or stamps purchased: $84,142.78.

4. Reduction of Tax Liability requested (Income and Profit Tax): $55,166.49.

5. Amount to be abated: ——.

6. Amount to be refunded (or such greater amount as is legally refundable): Tax, $55,166.49; Int., $7,510.95; $62,677.44.

[fol. 128] 7. Dates of payment (see Collector's receipts or indorsement of canceled checks): Apr. 14, June 15, Sept. 15, Dec. 14, 1921, and June 13, 1928 (under protest).

8. District in which return (if any) was filed: 5th District of New Jersey.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayments claimed as credit: $——.

11. Unpaid assessment against which credit is asked: Period from —— to ——, $——.

Deponent verily believes that this application should be allowed for the following reasons:

1. Said additional tax is illegal, erroneous, excessive and invalid and was illegally, erroneously and improperly assessed.

2. Said tax was assessed and collected after the statutory period of limitations upon the collection thereof by restraint or by proceedings in court for the collection thereof, had expired.

3. Said tax, as assessed and collected, was assessed upon an additional sum of $200,117.09. This sum represented the share of the decedent, Archibald H. Bull, for the period from February 13th, 1920 to December 31st, 1920, in the earnings of the firm of A. H. Bull & Co. pursuant to agreement among the partners that in the event of the death of any one of the partners, his estate should receive his proportionate share of the profits of the firm which he would have received had he lived, for the balance of the year from the date of death. Said sum of $200,117.09 was originally [fol. 129] assessed by the Commissioner as corpus and the estate tax thus assessed thereon was paid by the Executor. Thereafter, the Commissioner re-assessed the same item as income and assessed a tax in the sum of $55,166.49 which,

with interest, amounted to the said sum of $62,677.44. Said sum of $62,677.44 was paid under protest.

Said assessment was erroneously and illegally made against the said item, $200,117.09, as income, whereas in fact and in law the said $200,117.09 was corpus and not income and the tax on the said item as corpus had been assessed and paid previous to the re-assessment of said $200,117.09 as income.

Deponent calls particularly your attention to the case of George Nichols and Mary B. Nichols vs. United States, U. S. Court of Claims, #F-81, November 7, 1927, where the facts and circumstances were so almost identical as to make this decision a ruling case as applied to the present application for refund.

A petition for certiorari was filed in the United States Supreme Court to review the decision of the Court of Claims in the Nichols Case, the petition being entitled United States vs. Nichols, #753, October Term 1927. The petition for certiorari was denied on April 16th, 1928.

See also the earlier decision of the Court of Claims in the same Nichols Case, #F-81, April 4th, 1927.

Deponent, as Executor of the Estate of Archibald H. Bull, asks leave to submit additional affidavits setting forth the facts in detail which show that said item of $200,117.09 was corpus and not income, and also asks leave to submit briefs upon the questions of law involved, and also re-
[fol. 130] quests an oral hearing before the Commissioner upon said affidavits and briefs.

Estate Archibald H. Bull. (Signed) Ernest M. Bull, Trustee.

Sworn to and subscribed before me this 6th day of July, 1928. Annete E. Graham, Notary Public of N. Y.

[fol. 131] EXHIBIT "L" TO PETITION

"Ninth. Subject to the life interest therein of my said wife, Evelyn P. Bull, I give and bequeath the following sums of money to the following charitable organizations and institutions, provided the appraised value of my estate at the time of my death, after the payment of all Inheritance Taxes, both State and Federal, shall amount to at least $1,000,000.

(a) To the Young Men's Christian Association, of Elizabeth, New Jersey, $25,000 for its Endowment Fund;

(b) To the Elizabeth Orphan Asylum, of Elizabeth, New Jersey, $25,000.

(c) To the Home for Aged Women, of Elizabeth, New Jersey, $25,000 which sum I hope the Managers of said Home will use to start a fund for a new building.

(d) To the Third Presbyterian Church, of Elizabeth, New Jersey, $15,000.

(e) To the Charity Organization Society, of Elizabeth, New Jersey, $10,000.

(f) To the Visiting Nurse Association, of Elizabeth, New Jersey, $10,000.

(g) To the Trustees of the State Association of The Young Men's Christian Association of the State of New Jersey, a corporation, for the benefit of the Wawayanda Boys' Camp, $5,000.

(h) To the Elizabeth Rescue Mission, of Elizabeth, New Jersey, $1,000.

(i) To the Egenolf Day Nursery, of Elizabeth, New Jersey, $1,000.

[fol. 132] (j) To the Board of Foreign Missions of the Presbyterian Church, $5,000.

(k) To the Board of Home Missions of the Presbyterian Church, said money to be used for work of said Board in Porto Rico, $5,000.

(l) To the Board of Ministerial Relief of the Presbyterian Church and Sustentation Fund of the Presbyterian Church, $5,000.

In case the appraised value of my estate at the time of my death, after the payment of all Inheritance Taxes both State and Federal, shall amount to at least $2,000,000, then and in such case, I give and bequeath to each of the charitable organizations and institutions named in this ninth paragraph of my will, double the amount named to each."

[fol. 133] EXHIBIT "M" TO PETITION

Treasury Department,

Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-C1-809-CTK.

District of 5th New Jersey.
Estate of Archibald H. Bull.
Date of Death—February 13, 1920.

Alfred C. Frodel, Attorneys, % David A. Buckley, Jr., 815 15th Street, N. W., Washington, D. C.

SIR:

Reference is made to your request (received on January 31, 1929) for reopening with respect to certain income tax liabilities of the decedent and with respect to the Federal estate tax on the estate of the decedent. You suggested that adjustment of Federal estate tax should be deferred until the Federal income tax liability of the decedent should be determined. Accordingly, consideration of your application with respect to the Federal estate tax was held in abeyance.

By Bureau letter of August 9, 1929, you were informed of the decision of the Bureau upon your application for reopening with respect to income taxes. Accordingly, consid- [fol. 134] eration is now given to your application for reopening of the claim for refund of Federal estate tax, filed on October 10, 1922, and of the claim filed on April 14, 1928. The first claim was, on May 27, 1924, allowed in part and was rejected in part. The claim filed on April 14, 1928, was rejected in its entirety on June 30, 1928.

The facts alleged in the request for reopening do not bring the case within the purview of Treasury Decision 4235. The request for reopening does not relate to any contention presented in the claim filed on October 10, 1922. No payment was made within four years of the filing of the second claim on April 14, 1928. Your request for con-

ference is noted. In view of the fundamental objections to the allowance of further refund in this case, nothing would be gained by giving opportunity to file additional showing with a view to bringing the case within the purview of Treasury Decision 4235, or by granting a hearing.

Neither claim for refund is reopened.

Respectfully, R. M. Estes, Deputy Commissioner.

rsb.

[fol. 135] II. General Traverse—Filed Oct. 25, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles B. Rugg, Assistant Attorney General.

III. Change of Attorneys

The petition in this case was filed on September 16, 1930, by Dean Hill Stanley, Esq., as attorney of record.

On May 26, 1931, the said Dean Hill Stanley, withdrew his appearance as attorney for plaintiff.

On May 26, 1931, Mr. David A. Buckley, Jr., filed a power of attorney from plaintiff and was entered as attorney of record.

IV. Argument and Submission of Case

On October 11, 1933, the case was argued and submitted on merits by Mrs. Elizabeth D. Davis, for defendant. No appearance for plaintiff.

[fol. 136] V. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Littleton, J.**—Filed March 5, 1934

Mr. David A. Buckley, Jr., for the plaintiff.

Mr. Lawrence P. Mattingly was on the brief.

Mrs. Elizabeth B. Davis and Mr. John A. Rees, with whom was Mr. W. W. Scott, for the defendant.

Plaintiff instituted this suit to recover (1) the sum of $62,677.44, with interest, income tax for the period February 13 to December 31, 1920, alleged to have been erroneously and illegally collected; and (2) the sum of $41,517.45, with interest, estate tax alleged to have been erroneously and illegally collected.

The first item is based on the claim that upon the death of the decedent there was a dissolution of the partnership of which he was a member and that the amount of $212,718.79 thereafter received from the surviving partners, who continued the business under the circumstances hereinafter disclosed in the findings, was an acquisition by the surviving partners of the interest of the deceased partner in the partnership at the date of his death. It is insisted that inasmuch as the Commissioner of Internal Revenue valued the decedent's interest in the partnership for estate tax purposes at $235,202.99 at February 13, 1920, and the total amount ultimately received by the estate from this source was not in excess of the value fixed by the Commissioner, there was no taxable income to the estate on account thereof. In other words, it is contended by plaintiff that there was a sale by the estate to the surviving partners of the interest of the deceased partner in the partnership and that there was no gain or profit on the transaction.

In the alternative the petition alleges, with respect to the estate tax involved in the second item mentioned above, that if the amount of $212,718.79 received by the estate from the partnership was income, the amount was not a part of the gross estate at the date of decedent's death and should not have been included by the Commissioner in determining the value of the net estate for the purpose of the estate tax.

[fol. 137] We are precluded from considering the merits of the second claim relating to overpayment of the estate tax inasmuch as the suit was not instituted within two years after rejection of the claim for refund therefor nor within five years after collection of this tax.

Special Findings of Fact

1. Archibald H. Bull, a citizen and resident of Union County, New Jersey, died February 13, 1920, leaving a will, and plaintiff is the duly qualified and acting sole surviving executor and trustee of the decedent's estate.

2. Until his death the decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers, hereinafter referred to as the partnership. This partnership was created by written agreement of January 9, 1918, providing that the partnership was to begin January 1, 1918, and continue for one year from that date. The partnership agreement further provided "that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as the date of such withdrawal." After the termination of the period provided for by the written agreeement the partnership continued to operate from year to year by mutual consent in accordance with the prior written agreement and without the formality of further agreements in writing.

The first method set out in the aforementioned partnership agreement was followed by the surviving partners and the estate to December 31, 1920. The intent and meaning of the agreement in this regard were that the surviving partner, or partners, and the estate of the deceased partner might permit the interest of the decedent to remain in the business to the end of the calendar year in which he died.

3. The partnership was engaged in the ship brokerage business, for which no capital was required and none was ever invested by the partners. At his death, February 13, 1920, the decedent's share of the partnership profits on the business transacted from January 1, 1920, to that date was $24,124.20, and he had no other accumulated profits in the business and owned no other tangible property in connection therewith. Thereafter the estate received $212,718.79 from the surviving partners, the same being that portion of the profits of the business carried on by them from February 13 to December 31, 1920, which the decedent would have been entitled to receive for that period had he

lived. Of the amount last mentioned, $200,117.09 was received by the estate during the period mentioned and $12,601.70 was received during the first two months of 1921. After the receipt by the estate of the foregoing amounts, [fol. 138] no further sums were received by the estate from the partnership from the operation of the business subsequent to February 13, 1920, and all interest of the estate in the earnings and property of the business terminated at December 31, 1920.

4. When filing an estate-tax return, the executor included the decedent's interest in the partnership at a value of $24,124.20, which represented the decedent's share of the earnings accrued to the date of death, whereas the Commissioner, in 1921, valued such interest at $235,202.99, and subjected such increased value to the payment of an estate tax, which was paid in June and August 1921. The last-mentioned amount was made up of the amount of $24,124.20 plus the amount of $212,718.79, hereinbefore mentioned. The estate tax on this increased amount was $41,517.45.

5. April 14, 1921, plaintiff filed an income-tax return for the period February 13, 1920, to December 31, 1920, for the estate of the decedent, which return did not include, as income, the amount of $200,117.09 received as the share of the profits earned by the partnership during the period for which the return was filed. The estate employed the cash receipts and disbursement method of accounting.

6. Thereafter, in July 1925 the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified plaintiff of a deficiency in income tax due from the estate for that period of $261,212.65, which was due in part to the inclusion of that amount as taxable income and in part to adjustments not here in controversy. No deduction was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death.

7. September 5, 1925, plaintiff filed an appeal with the United States Board of Tax Appeals from the deficiency in income tax set out in finding 6. After a hearing of the case on its merits the Board affirmed the action of the

Commissioner in including the item of $200,117.09, referred to in finding 6, in taxable income without any reduction on account of the value of the decedent's interest in the partnership at his death (7 B. T. A. 993), and determined a deficiency of $55,166.49, which, with interest of $7,510.95, was paid April 14, 1928.

8. July 11, 1928, plaintiff filed a claim for refund of $62,677.44 on the following grounds:

"Said tax, as assessed and collected, was assessed upon an additional sum of $200,117.09. This sum represented the share of the decedent, Archibald H. Bull, for the period from February 13th, 1920, to December 31st, 1920, in the earnings of the firm of A. H. Bull & Company pursuant to agreement among the partners that in the event of the death of any one of the partners his estate should receive his proportionate share of the profits of the firm which he would have received had he lived for the balance of the year from the date of death. Said sum of $200,117.09 was originally assessed by the Commissioner as corpus and the estate tax thus assessed thereon was paid by the executor. Thereafter the Commissioner reassessed the same item as income and assessed a tax in the sum of $55,166.49 [fol. 139] which, with interest, amounted to the said sum of $62,677.44. Said sum of $62,677.44 was paid under protest.

"Said assessment was erroneously and illegally made against the said item, $200,117.09, as income, whereas in fact and in law the said $200,117.09 was corpus and not income and the tax on the said item as corpus had been assessed and paid previous to the reassessment of said $200,117.09 as income."

The claim was rejected May 18, 1929.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

OPINION

LITTLETON, Judge, delivered the opinion of the court:

At the time of his death on February 13, 1920, decedent was a member of a partnership operating under an agreement containing a provision that in the event of death of a partner the surviving partners, with the consent of the executor, should be at liberty to continue the business for a stated time and the estate of the deceased partner might participate in the gains or losses of the business for such period to the same extent as the deceased partner would have participated if living.

The decedent's share of the partnership profits from January 1 to the date of his death on February 13, 1920, was $24,124.20, and the amount of the profits to which he would have been entitled for the remainder of that year, had he lived and continued a member of the partnership, would have been $212,718.79, which the estate received. Of the latter amount $200,117.09 was received by the estate during 1920 and the balance was received in 1921. The Commissioner included the full amount of the profits from February 13 to December 31, 1920, ultimately received by the executors, together with the earnings accrued to decedent at date of his death, as a part of the estate of the decedent subject to estate tax, and also included the earnings of $200,117.09 received in 1920 as income of the estate for the taxable period February 13 to December 31, 1920, subject to income tax.

We cannot consider whether the Commissioner correctly included the total amount received from the business in the net estate of the decedent subject to estate tax for the reason that the suit was not timely instituted. The only question for decision is whether the Commissioner correctly included the item of $200,117.09 in income for the purpose of income tax payable by the estate.

Plaintiff contends that upon the death of the decedent there was a dissolution of the partnership and that the amount of $212,718.79 paid by the surviving partners from the earnings of the business to December 31, 1920, was a consideration for the acquisition by them of the interest of the deceased partner in the partnership, and that, since the [fol. 140] value of the decedent's interest in the partnership at the date of his death, as determined by the Com-

missioner, was $235,202.99, there was no taxable income to the estate from the transaction.

The defendant insists that the business was continued, either as a partnership composed of the surviving partners and the executor or as a joint venture in which the estate shared in the profits and losses in the same manner as the decedent would have had he lived and, since the partnership realized profits, the portion of such earnings received by the estate constituted taxable income to it.

We find it unnecessary to discuss the question whether the estate or the executor was a member of a new partnership from February 13 to December 31, 1920, for the partnership agreement, when properly interpreted, did not provide for a sale of a deceased partner's interest to the surviving partners for a consideration to be measured by a proportionate part of whatever profits might be earned by the business for the remainder of the calendar year in which such member died. The language of the agreement shows clearly, we think, that the estate of a deceased partner, if it elected not to withdraw the decedent's interest immediately, was to give up no rights with respect to the property of the deceased in the business at the date of death if profits should be earned by the continuance of the business by the surviving partner, or partners, for the remainder of the calendar year. If the operation of the business had resulted in a loss, the estate would have shared therein at least to the amount of earnings accrued to the deceased partner at the date of his death. Burwell v. Mandeville's Executor, 2 How. 560. However, as there was no loss, we need not further discuss this phase of the agreement. In this case profits were earned and the estate became entitled to receive, and it did receive, in final settlement, that which the decedent would have been entitled to receive at December 31, 1920, had he lived until that date, namely, the profits accrued to decedent to February 13, 1920, of $24,124.20 and a portion of the profits of the business from February 13 to December 31, 1920, in the amount of $212,718.79. The first-mentioned amount of $24,124.20 was taxable income to the decedent for the taxable period prior to his death and constituted a part of his estate for the purpose of the estate tax. This amount was not again taxable to the estate when received, but the amount of $212,718.79 was taxable income as a gain or profit de-

rived by the estate from the use or employment of the property belonging to the decedent at the date of his death, pursuant to an arrangement between the decedent and the other partners prior to his death, to the carrying out of which the estate agreed.

The business in which decedent was a partner was largely, if not entirely, of a personal-service nature. No cash capital or other tangible asset was required and none was invested by the partners. The earnings depended largely upon the personal acquaintance and business relationship of the partners, and shippers and shipowners. Good will was important. When considered in connection with the nature of the business, the agreement, which was made at the time the partnership was first formed, shows that its purpose was to provide a method whereby the business would not be suddenly disrupted in the event of death of any of the partners by immediate withdrawal of accumulated funds by the estate, possible necessity of [fol. 141] change in name, or a controversy with respect to matters of accounting.

The estate consented to allow the interest of decedent in the partnership at the date of his death to remain in the business for a period subsequent to death and to a continuation of the business by the surviving partners in accordance with the method provided in the agreement until December 31, 1920. As a result, the estate received $212,718.79 as a gain which was earned subsequent to February 13, 1920. The estate, being a taxable entity, was clearly liable for income tax on this income and was properly taxed on $200,117.09 thereof received in 1920.

The petition must, therefore, be dismissed. It is so ordered.

[fol. 142] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 5th day of March, A. D., 1934, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is adjudged and ordered that the plaintiff's petition be and the same hereby is dismissed.

VII. Proceedings After Entry of Judgment

On May 4, 1934, the plaintiff filed a motion to extend time (60 days from May 4, 1934) within which to file a motion for new trial and for argument on same.

On May 4, 1934, the court entered the following order on said motion:

"The plaintiff is granted an extension of thirty days (30) within which to file motion for new trial. The matter of oral argument will be considered after motion is filed."

On July 3, 1934, on motion made therefor, the plaintiff filed a motion for new trial.

On October 15, 1934, the court overruled said motion.

[fol. 143] Clerk's Certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 39,277. Court of Claims. Term No. 649. Ernest M. Bull, Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed January 15, 1935. File No. 649, O. T., 1934.

Supreme Court of the United States

Order Allowing Certiorari—Filed March 4, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
JAN 15 1935
CHARLES ELMORE CROPLEY
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS, WITH BRIEF IN SUPPORT OF PETITION.

DAVID A. BUCKLEY, JR.,
Attorney for Petitioner.

LORING M. BLACK,
H. RUSSELL BISHOP,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition	1
Prayer	1
Questions presented	2
Statutory provisions	2
Statement	3
Opinion of Court of Claims	5
Petitioner's contentions	6
Reasons for granting the writ	7
Brief in support of petition	9
Opinions below	9
Jurisdiction	9
Questions presented	10
Statutes involved	10
Statement	10
Specification of errors to be urged	10
Summary of argument	10
Argument	10
I. The death of petitioner's testator worked a dissolution of the partnership	10
II. The partnership agreement provided the methods for liquidating a deceased partner's interest in the partnership, and any property coming to the estate as the deceased partner's interest represented capital and was part of the corpus of the estate	12
III. The amount being the value of property received by bequest, may not be taxed as income because of statutory exemption	17
IV. Having once been determined to be corpus and an estate tax having been paid thereon, the amount in question may not be subjected to an income tax	18
V. The amount in question being less than the value of the property as of the date of death as determined by the Commissioner, there was no gain upon which to levy any income tax	20
Conclusion	21

Table of Cases.

Brewster v. Gage, 280 U. S. 334	17, 18
Burnett v. Whitehouse, 283 U. S. 148	18
Darcy v. Commissioner of Internal Revenue, 66 Fed. (2d) 581, 584	10
Doyle v. Mitchell Brothers Co., 247 U. S. 179, 184, 185	20

	Page
Eisner v. Macomber, 252 U. S. 189	16
Hill v. Commissioner of Internal Revenue, 38 Fed. 2nd 165, 168	12
Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206, 215	17
Long v. Thayer, 150 U. S. 520, 522	10
Lucas v. American Code Co., 280 U. S. 445, 449	20
Matter of Lee, 215 App. Div. 576, 577	10, 16
Nichols v. United States, 64 C. Cls. 241, 245	19
Pope v. Commissioner of Internal Revenue, 39 F. 2d 420, 424	12
United States v. Carter, 19 F. (2d) 121	16
United States v. Supplee-Biddle Co., 265 U. S. 189, 195, 196	20
United States v. Wood, 8 Fed. Supp. 939	13

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Ernest M. Bull, sole surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased, prays a Writ of Certiorari to review the decision and judgment of the Court of Claims entered March 5, 1934, dismissing petitioner's petition, filed to recover (1) the sum of $62,677.44 with interest, income tax for the period February 13, 1920, to December 31, 1920, which petitioner alleged to have been erroneously and illegally collected; and (2) the sum of $41,517.45 with interest, estate tax alleged to have been erroneously and illegally collected. Petitioner's motion for a new trial was overruled on October 15, 1934.

Questions Presented.

1. Where, after a partner's death, the partnership business is continued as provided in the partnership agreement for a certain length of time, and profits, realized from such continuation of the partnership business, are paid to the executor of deceased partner's estate in full payment of deceased partner's interest in partnership, do such profits represent taxable income to the deceased partner's estate?

2. Is not the question as to whether or not such profits represent income confined to the determination of whether or not the amount of profits received exceeded the value of the deceased partner's interest at the time of death?

3. May the value of property which has been determined to be part of the corpus of an estate, and on which a Federal Estate Tax has been paid, be subsequently subjected to the payment of an income tax?

4. May the value of property which has been expressly exempted from being included as income nevertheless be subjected to the payment of an income tax?

Statutes Involved.

Section 213 of the Revenue Act of 1918 provides:

> "That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> "(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, growing out of the ownership or use of or interest in such property; also from interest, trades, business, commerce or sales, or dealings in property, whether real or personal, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

"(b) Does not include the following items, which shall be exempt from taxation under this title: * * *"

"The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);"

Section 218 of the Revenue Act of 1918 provides:

"(a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

Statement.

Archibald H. Bull, a citizen and resident of Union County, New Jersey, died testate February 13, 1920. At the time of his death, decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). Said partnership was created by written agreement dated January 9, 1918, providing that the partnership was to begin on January 1, 1918, and to continue for one year from that date (R. 84). After the termination of the period provided for in the partnership agreement, the partnership continued to operate from year to year in accordance with the said agreement and without any further agreement in writing (R. 84).

Among other things, the partnership agreement provided:

"* * * that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said

profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration; and all adjustments of profits or losses shall be made as the date of such withdrawal." (R. 84.)

The first method provided was adopted by the estate and the surviving partners until December 31, 1920. At the time of decedent's death, February 13, 1920, decedent's share in the partnership profits on the business transacted from January 1, 1920, to February 13, 1920, was $24,124.20, and he had no other accumulated profits in the business (R. 84). The estate received during 1920, as that portion of the profits of the business carried on by the surviving partners, which the decedent would have been entitled to had he lived, the sum of $200,117.09. The further sum of $12,601.70 was received during the first two months of 1921, making a total of $212,718.79 received by the estate from the surviving partners (R. 84-85).

In filing an estate tax return, the executor valued decedent's interest in the partnership at $24,124.20, the amount of the decedent's share in the earnings accrued to the date of his death. The Commissioner valued such interest at $235,202.99 and subjected such value to an estate tax, which was paid in June and August of 1921 (R. 85).

On April 14, 1921, the executor filed an income tax return for the estate covering the period February 13, 1920, to December 31, 1920, which did not include as income the amount of $200,117.09, the amount received as the estate's share of the profits from carrying on the business for that period. In July, 1925, the Commissioner determined that the said sum of $200,117.09 should have been returned by the executor as income to the estate and notified the executor of a deficiency in income tax due from the estate

for the period of February 13, 1920, to December 31, 1920, of $261,212.65 made up in part of the said amount of $200,117.09 and of other adjustments not here involved. September 5, 1925, plaintiff appealed to the United States Board of Tax Appeals from the deficiency in income tax and the Board, after hearing the case on its merits, affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income and determined a deficiency of $55,116.49 with interest of $7,510.95 (7 B. T. A. 993). The said amounts totalling $62,677.44 were paid April 14, 1928 (R. 85-86).

On July 11, 1928, a claim for refund of $62,677.44 was filed by the executor on the grounds that the amount on which the tax was assessed was corpus, had properly been taxed as corpus, and in fact and in law was not income and, therefore, not subject to the payment of an income tax. The claim was rejected May 18, 1929 (R. 86).

On September 16, 1930, the executor filed his petition in the Court of Claims. The parties entered into a stipulation of facts, the executor submitted evidence, and on March 5, 1934, the Court of Claims, after making special findings of fact, entered its judgment dismissing executor's petition (R. 89). A motion for extension of time within which to file a motion for a new trial was granted on May 4, 1934, extending the time within which the plaintiff might file a motion for a new trial to thirty days from May 4, 1934 (R. 90). On July 3, 1934, the plaintiff filed a motion for a new trial, which was overruled by the Court on October 15, 1934 (R. 90).

Opinion Below.

The opinion below is reported in 6 F. Supp. 141.

The gist of the opinion below is that the amount $200,117.09 was properly subjected to the payment of an income

tax for the reason that the amount was a "gain or profit derived by the estate from the use or employment of the property belonging to the decedent at the date of his death, pursuant to an agreement between the decedent and the other partners prior to his death, to the carrying out of which the estate agreed."

Petitioner's Contentions.

The petitioner contends that the court below erred in holding that the estate was liable for the payment of an income tax on the sum of $200,117.09 received in 1920; and that, on the contrary, the estate was not so liable because:

1. The partnership agreement, properly interpreted, clearly provided for the sale of the deceased partner's interest in the partnership, and the amount received by the estate represented the purchase price of said deceased partner's interest, and, therefore, represented corpus and not income.

2. The amount received by the estate being the value of property received by bequest may not, because of the provision of Section 213 of the Revenue Act of 1918, be classed as income.

3. The amount in question having been determined to be corpus, and an estate tax having been paid thereon, it may not be subjected to the payment of an income tax.

4. The amount in question, having been received as payment for conversion of a capital asset, and not being in excess of the value of said capital asset at the date of death, could not represent a gain and, therefore, be taxable as income.

5. If the estate were liable at all for income tax on amounts received, such liability was confined to the tax

upon the profit, if any, represented by the difference between the value at the time of death as fixed by the Commissioner and the amount actually realized.

Reasons for Granting the Writ.

This case presents an important question of Federal Taxing Law, which has not been decided by this Court. There is a great contrariety of judicial opinion on the subject of the nature of the interest of the estate of a deceased partner in amounts earned by carrying on the business of the partnership, pursuant to the partnership agreement. This diversity of judicial thought is not confined to the various Circuit Courts of Appeals, but the opinions of the Board of Tax Appeals and the Court of Claims on this subject cannot be reconciled in principle. It is believed to be in the public interest that this question be settled by this Court.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari to review the judgment of the Court of Claims in this case be granted.

DAVID A. BUCKLEY, JR.,
Attorney for Petitioner.

LORING M. BLACK,
H. RUSSELL BISHOP,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND TRUSTEE OF THE ESTATE OF ARCHIBALD H. BULL, DECEASED,
Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims is reported in 6 Fed. Supp. 141. It is found on pages 87 to 89, inclusive, of the record.

Jurisdiction.

The judgment of the Court of Claims was entered on March 5, 1934. A motion for a new trial was filed by leave of court on July 3, 1934, which was overruled on October 15, 1934.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Sec. 3; 43 Stat. 939; 28 U. S. C. Sec. 288.

Statement.

Statements of the questions presented and of the facts in this case will be found in the petition (Petition, *ante*, pp. 2, 3-5).

Specification of Errors to Be Urged and Summary of Argument.

The statement of "Petitioner's Contentions" in the petition (Petition, *ante*, p. 6) contains specifications of the errors now urged and summarizes the argument here following:

Statutes Involved.

These are indicated in the Petition (*ante*, p. 2-3).

ARGUMENT.

Point I.

The Death of Petitioner's Testator Worked a Dissolution of the Partnership.

The death of Archibald H. Bull on February 13, 1920, dissolved the partnership of A. H. Bull & Company as then constituted. *Long* v. *Thayer*, 150 U. S. 520, 522; *Darcy* v. *Commissioner of Internal Revenue*, 66 F. (2d) 581, 584; *Matter of Lee*, 215 App. Div. 576, 577.

The respondent in the court below conceded that the death of a partner terminated the partnership relationship. There is, therefore, no dispute between the parties as to whether or not the partnership was dissolved by the death of Archibald H. Bull.

The partnership having been dissolved, the deceased partner's interest therein became an asset of his estate

and as such asset had a value which was determined by the Commissioner. It necessarily follows that whatever was received by the estate in liquidation of this capital asset was nothing more than the return of capital to the extent that it did not exceed the value at the beginning of the period.

If, for example, the estate at the time of death had sold this particular asset of the estate at the value placed upon it by the Commissioner, there is no question but that the amount received would not have represented income to the estate unless it exceeded such value.

This is the procedure which was followed here. The surviving partners acquired the entire business, goodwill, existing contracts and whatever other property belonged to the partnership at the time of death under a defined method which was set forth in the partnership agreement. In other words, by paying to the estate the profits which the deceased would have received had he lived, as provided in the agreement, the surviving partners purchased an asset of the estate. The amount received by the estate as the purchase price paid for this asset could not have been income unless the amount received had been in excess of the value placed upon the partnership interest by the Commissioner.

The relationship between the estate and the surviving partners was one of creditor and debtor. The profits which were paid by the surviving partners from time to time to the estate represented payments on the amount of the debts. When final payment was made, the relationship was terminated and the estate's interest in the partnership as constituted at the time of the death of Archibald H. Bull was extinguished.

Point II.

The Partnership Agreement Provided the Methods for Liquidating a Deceased Partner's Interest in the Partnership, and Any Property Coming to the Estate as the Deceased Partner's Interest Represented Capital and Was Part of the Corpus of the Estate.

In drawing the partnership agreement, the partners obviously had in mind the fact that the death of a partner would dissolve the partnership, and that upon such dissolution it would be necessary to value the deceased partner's interest and discharge such interest. Rather than leave such determination to the hazards of an accounting and liquidation proceeding, the partners agreed among themselves that one of two methods should be followed in determining the deceased partner's interest: the business should be carried on by the surviving partners to the end of the calendar year and the estate of the deceased partner should receive the same interests as the deceased partner would if living, or the deceased partner's estate might withdraw the deceased partner's interest within thirty days after probate of the will and all adjustments should be made as of the date of withdrawal.

The first method was adopted. The partnership business was carried on and as profits were realized from time to time, the amounts the decedent would have received if he had lived were paid to his estate. Such payments were made by the surviving partners in the purchase of a capital asset. *Hill* v. *Commissioner of Internal Revenue*, 38 F. (2d) 165, 168. *Pope* v. *Commissioner of Internal Revenue*, 39 F. (2d) 420, 424. This being true, the receipt of such payments by the estate represented the value received in the conversion of a capital asset and not income.

It would make no difference in the result if the second method had been adopted. Any amount received by the

estate under either method would have represented the value of the deceased partner's interest in the partnership—that is, a capital asset.

The court below has entirely misconstrued the purpose of that part of the agreement relating to a deceased partner's interest. It states (Opinion, R. 89):

> "When considered in connection with the nature of the business, the agreement which was made at the time the partnership was first formed, shows that its purpose was to provide a method whereby the business would not be suddenly disrupted in the event of death of any of the partners by immediate withdrawal of accumulated funds by the estate, possible necessity of change in name, or a controversy with respect to matters of accounting."

Such an interpretation of the purpose of the agreement entirely overlooks the fact that if the second method had been adopted that all of the contingencies supposed to have been provided against would have happened with the possible exception of "a controversy with respect to matters of accounting." If the partners had had in mind what the court attributes to them, the second method would never have been included in the agreement.

In carrying on the new partnership, certain profits were realized, and the estate received the same share of these profits as the decedent would have received if he had lived. In so far as the surviving partners were concerned, these profits represented income; in so far as the estate was concerned, it represented capital, an amount received in liquidation of a capital asset.

In *United States* v. *Wood et al.*, 8 Fed. Supp. 939, Eastern District of Pennsylvania, reported January 21, 1935, the court had under consideration a case with facts analagous to the facts in the pending case. In deciding that case, the

District Court, speaking through Judge Dickinson, summed up the facts as follows:

> "Defendant's decedent was a member of a partnership. Had he lived, it may be assumed that a sum representing his share of partnership profits would have been allotted to him at the first of the year following the date of his death. At the time of his death, such allotment had not been made, although in the offing. The regular time for the closing of the books was the end of the year. The decedent died February 17, 1926. When the books were closed in December, 1926, it became known that decedent's share of the profits from the last profit-sharing date to the date of his death was the sum for which suit is brought. This sum was included in the value of his estate as principal, and death taxes paid thereon. The United States now claims it was income and taxable as such."

In its conclusion, the court stated:

> "The fallacy which underlies the whole argument is that the nature of what a thing is can be changed by changing the name by which you choose to call it; in other words, anything can be made income by the simple expedient of calling it by that name. The underlying inquiry is, What is an interest in a partnership? It is nothing more nor less than the right to call upon the copartners for an accounting. The sole right of the representative of a deceased partner is to call upon the surviving partners to account for the assets of the partnership in their hands. There might have been gains or losses, and almost surely both gains and losses, with a net result one way or the other. A balance could be struck in favor of or against the deceased partner. If in his favor, it might be made up of the accumulations of undistributed profits for many years. It might develop that the profits of the last year's business made up the whole balance; the business up to the last year showing in the red. In the settlement of the decedent's estate, his interest in the partnership would be inven-

toried at its appraised value. His executor would be chargeable with what he received for it. The question is whether the decedent's estate would in either of the events we have instanced be chargeable with an income tax on the sum eventually received from the partnership as income received by him. That it was part of his estate, and taxable as such, could readily be found, but that what the value of his partnership interest turned out to be was income which the decedent had received and upon which he owed an income tax is a thought difficult to grasp. * * * Furthermore a law which imposes a tax on income imposes no tax on what is not income, and the interest of a deceased partner in a firm, while it is part of his estate is not taxable income within the meaning of the income tax laws, nor is any part of it. * * * A partnership is an entity. It may have received gains, but those gains (or his proportionate share of them) do not become income to the individual partner until set apart to, and received by, him. Before that they are income to the partnership but not income to the individual partners. If the partnership is dissolved by the death of a partner, the sole right of the estate of the deceased partner, as we have already said, is to require the surviving partners to account for the share of the decedent in the partnership assets. That share is part of his estate but is assuredly not income. * * *

Accepting the doctrine that a partner's share of partnership profits is taxable income, whether distributed or not, the share of profits may be said to be income because it is income. When, however, a partner's share in a dissolved partnership is ascertained by the difference between what is realized from its assets and the sum of its debts, how can such a balance be held to be income?

The whole argument may be summed up in this very narrow distinction. If a sum of money comes to a decedent's estate from a partnership of which the decedent was a member as money to which the decedent in his lifetime had a right as income, it is income upon

which a tax may be assessed against a decedent's estate precisely as it might have been assessed against him had he lived. If, however, the sum received represents the share of the decedent in the assets of the partnership, it is principal, and no part of it is made income to the decedent by the mere fact that included in the assets were moneys which came to the firm as profits. To express this thought in the concrete, if the partnership had made profits his share in which was demandable by a partner, such sum would be income to the individual partner, but, if the firm was dissolved, then the share of each partner in the net assets would not be income to him, notwithstanding the fact that the assets included what were profits to the firm."

See also *United States* v. *Carter et al.*, C. C. A. 19 F. (2d) 121, where the court had under consideration the question of the interest of the deceased's estate in the partnership of which he was a member at the time of his death and held such interest in the partnership not taxable as income; that what the executors received came to them as part of the *corpus* of the estate of the deceased.

In *Matter of Lee*, 215 App. Div. (N. Y.) 576, the court had under consideration the question of whether or not an estate had received income and was liable for the payment of income tax where the estate had received an amount equal to the share of the net profits, for a certain period, which a deceased partner would have received if living, as payment of deceased partner's interest in the firm. In deciding this question, the court said at page 578:

"The sum so paid was in no sense income. 'Income may be defined as the gain derived from capital, from labor or from both combined.' (*Eisner* v. *Macomber*, 252 U. S. 189.) The estate had no capital invested in the new partnership. It had no interest in the business of the partnership; in its profits or in its losses. Certainly, it performed no labor in connection therewith.

> There was nothing of which the sum paid was the 'outcome' to those who paid it, or 'income' to those who received it. It was a capital sum paid to purchase and extinguish the interest of George C. Lee at the time of his death in the good will of the old partnership. It was not a sum properly constituting a basis for the income tax imposed and paid."

Income tax on the profits was payable by and only by the surviving partners, for they were the only ones to whom it was income.

There exists no authority in law for subjecting one person to the payment of another's tax. This Court in disposing of a similar question has stated:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income." *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, 215.

Point III.

The Amount, Being the Value of Property Received by Bequest, May Not Be Taxed as Income Because of Statutory Exemption.

Section 213 (b) (3) of the Revenue Act of 1918 provided that "the value of property acquired by gift, bequest, devise or descent" shall not be considered as gross income. The value of the petitioner's testator's interest in the partnership of A. H. Bull & Company was the value of property acquired by bequest.

Upon the testator's death, his interest in the partnership, together with all other personal property belonging to him, vested in his executor; but, at the same time, the right to receive this property vested in the legatees named in his will, and, therefore, the value of the partnership interest, the same as any other personal property interest passing under the will, came to the legatees by bequest.

Brewster v. *Gage*, 280 U. S. 334.

The respondent in the court below contended that the property was not received by bequest, because title to it first vested in the executors. This contention is fallacious, as is shown by the decision in *Brewster v. Gage, supra,* wherein the Court says:

> "The decree of distribution confers no new right; it merely identifies the property remaining, evidences the right of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death."

The exemption provided by the statute is clear and any attempt to narrow this exemption has been condemned by this Court. In *Burnett* v. *Whitehouse,* 283 U. S. 148, the Court, speaking through Mr. Justice McReynolds, said at page 151:

> "The exemption in Section 213 is plain and should not be destroyed by any strained construction of general language found in Section 219."

To say that the amount in question was not the value of property received by bequest is to disregard substance and give undue importance to form. It amounts to stating that beneficiaries do not own property, the naked title to which is temporarily in a trustee.

Point IV.

Having Once Been Determined to Be Corpus and an Estate Tax Having Been Paid Thereon, the Amount in Question May Not Be Subjected to an Income Tax.

As before stated (Petition, *ante,* p. 4) the Commissioner determined that the amount received by the estate from the surviving partners represented a part of the corpus of the estate and assessed thereon an estate tax which was paid.

The Commissioner was correct in determining that the

property in question was corpus as it cannot be disputed that the interest of the estate in the partnership was an asset of the estate. The Commissioner determined the value thereof and such amount represented the value of decedent's interest in the partnership, which was clearly as much a part of the corpus of his estate as any other property, tangible or intangible, real or personal, which the decedent owned at the time of his death.

The Revenue Act of 1918, Section 402, provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property "(a) To the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate, and the expenses of its administration, and is subject to distribution as part of his estate." Thus, by statutory definition, the partnership interest was part of the corpus of the estate. It was subject to the payment of charges against his estate; it was subject to the expenses of administration of his estate; and it was subject to distribution as part of his estate.

Having once been properly classed as corpus, the asset in question could not be classed as income and any profit upon the sale or liquidation thereof is limited to the excess of the value at the time of death, as determined by the Commissioner.

> "When, therefore, an item is properly determined to constitute part of the gross estate of a decedent for estate tax purposes, it cannot by any sort of reasoning be made to constitute a part of the income of the same estate. It is a part of the corpus."
>
> *Nichols* v. *U. S.*, 64 C. Cls. 241, 245.

To further subject the amount to the payment of an income tax would amount to double taxation, against which

there exists a strong presumption, except where the language of the statute clearly calls for such double taxation. Said the Court in *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, pp. 195, 196:

> "The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax upon the proceeds of the two policies in this case over and above $40,000 that is an income tax and an estate tax. Such a duplication even in an exigent war tax measure is to be avoided unless required by express words."

POINT V.

The Amount in Question Being Less Than the Value of the Property as of the Date of Death as Determined by the Commissioner, There Was No Gain Upon Which to Levy Any Income Tax.

The amount received by the executor from the surviving partners was not greater than the value placed upon the partnership interest by the Commissioner. The rule that there must be a gain before there can be any taxable income is elementary.

> "In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration." *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 184, 185.

> "Generally speaking, the income tax law is concerned only with realized losses as with realized gains." *Lucas* v. *American Code Co.*, 280 U. S. 445, 449.

The Commissioner placed a value upon the deceased partner's interest in the partnership as constituted at the date of death. This was a value placed upon a capital asset which was acquired by the surviving partners as herein-

before stated. Unless the amount received had exceeded the value placed upon the asset by the Commissioner, there was no income. There could be no income unless there was a gain. What the estate received was merely a return of capital which did not quite equal the value placed upon it by the Commissioner at the beginning of the period.

Since there was no gain, the only basis upon which an income tax could have been levied is wholly wanting and the Commissioner erred in levying an income tax and the court below erred in sustaining the imposition of the income tax.

Conclusion.

The decision of the Court of Claims is wrong. The writ of certiorari should be granted, and upon a final hearing the judgment of the Court of Claims should be reversed.

Respectfully submitted,

DAVID A. BUCKLEY, JR.,
Attorney for Petitioner.

LORING M. BLACK,
H. RUSSELL BISHOP,
Of Counsel.

(5861-C)

PETITIONERS' BRIEF

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2, 3
Statement	3, 4, 5
Specification of errors to be urged	5, 6
Summary of Argument	6, 7, 8
Argument:	
I. The Death of Petitioner's Testator Dissolved the Partnership and Capitalized Any Interest Which the Decedent Had in the Partnership	8
II. The Partnership Agreement Provided the Methods of Liquidating a Deceased Partner's Interest and Any Property Coming to the Estate in Payment of the Deceased Partner's Interest Represented Capital and Was Part of the Corpus of the Estate	12
III. The Amount in Question, Being an Amount Received in Conversion of a Capital Asset, Could Not Be Income Unless It Exceeded the Value of the Asset at the Beginning of the Period	15
IV. Unless the Amount in Question was Income to the Estate, the Estate was Not Liable for the Payment of An Income Tax Upon the Said Amount. Income is Taxable Only to Those Persons to Whom It is Income	19
V. Having Been Determined to be Corpus and An Estate Tax Having Been Paid Thereon the Amount in Question Should Not be Subjected to An Income Tax	22
VI. The Amount, Being the Value of Property Received by Bequest, May Not Be Taxed as Income Because of Statutory Exemption	24
Conclusion	26

CITATIONS.

Cases:	Page
Anderson v. Wilson, 289 U. S. 20	20
Bowers, Collector v. Kerbaugh Empire Company, 271 U. S. 170	15, 16
Brewster v. Gage, 280 U. S. 327	24
Burnett v. Logan, 283 U. S. 404	23, 25
Burnett v. Whitehouse, 283 U. S. 148	25
Drier v. Helvering, Commissioner of Internal Revenue, 72 F. (2d) 76	16
Eisner v. Macomber, 252 U. S. 189	8, 15
Eldorado Coal & Mining Company v. Mager, 255 U. S. 522	17
Goodrich v. Edwards, 255 U. S. 527	17
Hartley v. Commissioner of Internal Revenue, 72 F. (2d) 352	20
Hill v. Commissioner of Internal Revenue, 38 F. (2d) 165	14
Hoeper v. Tax Commission, Wis., 284 U. S. 206	22
Irwin v. Gavit, 268 U. S. 161	21
Long v. Commissioner, 289 U. S. 109	20
McLaughlin v. Alliance Insurance Company, 286 U. S. 244	18
Merchants Loan & Trust Company v. Smietanka, 255 U. S. 509	17
Nichols v. United States, 64 Ct. Cls., 241	23
Pope v. Commissioner of Internal Revenue, 39 F. (2d) 420	14
Saenger v. Commissioner of Internal Revenue, 69 F. (2d) 631	21
United States v. Carter, 19 F. (2d) 121	18
United States v. Supplee-Biddle Co., 265 U. S. 189	23
United States v. Wood, et al., 8 F. Sup. 939	10
Walsh v. Brewster, 255 U. S. 536	17
Waud v. United States, 71 Ct. Cls. 567	20, 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 649.

ERNEST M. BULL, Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased,
Petitioner,

vs.

THE UNITED STATES.

BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Claims is reported in 6 Fed. Supp. 141. It is found on pages 87 to 89, inclusive, of the record.

JURISDICTION.

The judgment of the Court of Claims was entered on March 5, 1934 (R. 82). A motion for a new trial was filed by leave of Court on July 3, 1934, which was overruled on October 15, 1934 (R. 90). Petition for writ of certiorari

was filed January 15, 1935, and the writ was granted March 4, 1935.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, Sec. 3(b); 43 Stat. 939; 28 U. S. C. Sec. 288.

QUESTIONS PRESENTED.

1. Where, after a partner's death, the partnership business is continued as provided in the partnership agreement for a certain length of time, and profits, realized from such continuation of the partnership business, are paid to the executor of deceased partner's estate in full payment of deceased partner's interest in partnership, do such profits represent taxable income to the deceased partner's estate?

2. Is not the question as to whether or not such profits represent income confined to the determination of whether or not the amount of profits received exceeded the value of the deceased partner's interest at the time of death?

3. May the value of property which has been determined to be part of the corpus of an estate, and on which a Federal Estate Tax has been paid, be subsequently subjected to the payment of an income tax?

4. May the value of property which has been expressly exempted from being included as income nevertheless be subjected to the payment of an income tax?

STATUTES INVOLVED.

Section 213 of the Revenue Act of 1918 provides:

> "That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> "(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, growing out of the ownership or use of or interest in such property; also from interest, trades, business, commerce or sales, or dealings in property, whether real or personal, rent,

dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

"(b) Does not include the following items, which shall be exempt from taxation under this title: * * *"

"The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);"

Section 218 of the Revenue Act of 1918 provides:

"(a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year."

STATEMENT.

Archibald H. Bull, a citizen and resident of Union County, New Jersey, died testate February 13, 1920. At the time of his death, decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). Said partnership was created by written agreement dated January 9, 1918, providing that the partnership was to begin on January 1, 1918, and to continue for one year from that date (R. 84). After the termination of the period provided for in the partnership agreement, the partnership continued to operate from year to year in accordance with the said agreement and without any further agreement in writing (R. 84).

Among other things, the partnership agreement provided:

"* * * that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the

usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as the date of such withdrawal." (R. 84.)

The first method provided was adopted by the estate and the surviving partners until December 31, 1920. At the time of decedent's death, February 13, 1920, decedent's share in the partnership profits on the business transacted from January 1, 1920, to February 13, 1920, was $24,124.20, and he had no other accumulated profits in the business (R. 84). The estate received during 1920, as that portion of the profits of the business carried on by the surviving partners, which the decedent would have been entitled to had he lived, the sum of $200,117.09. The further sum of $12,601.70 was received during the first two months of 1921, making a total of $212,718.79 received by the estate from the surviving partners. (R. 84-85)

In filing an estate tax return, the executor valued decedent's interest in the partnership at $24,124.20, the amount of the decedent's share in the earnings accrued to the date of his death. The Commissioner valued such interest at $235,202.99 and subjected such value to an estate tax, which was paid in June and August of 1921 (R. 85).

On April 14, 1921, the executor filed an income tax return for the estate covering the period February 13, 1920, to December 31, 1920, which did not include as income the amount of $200,117.09, the amount received as the estate's share of the profits from carrying on the business for that period. In July, 1925, the Commissioner determined that the said sum of $200,117.09 should have been returned by the executor as income to the estate and notified the executor of a deficiency in income tax due from the estate for the period

of February 13, 1920, to December 31, 1920, of $261,202.65 made up in part of the said amount of $200,117.09 and of other adjustments not here involved. September 5, 1925, plaintiff appealed to the United States Board of Tax Appeals from the deficiency in income tax and the Board, after hearing the case on its merits, affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income and determined a deficiency of $55,116.49 with interest of $7,510.95 (7 B. T. A. 993).. The said amounts totalling $62,677.44 were paid April 14, 1928 (R. 85-86).

On July 11, 1928, a claim for refund of $62,677.44 was filed by the executor on the grounds that the amount on which the tax assessed was corpus, had properly been taxed as corpus and in fact and in law was not income and, therefore, not subject to the payment of an income tax. The claim was rejected May 18, 1929 (R. 86).

On September 16, 1930, the executor filed his petition in the Court of Claims. The parties entered into a stipulation of facts, the executor submitted evidence, and on March 5, 1934, the Court of Claims, after making special findings of fact, entered its judgment dismissing executor's petition. (R. 89.) A motion for extension of time within which to file a motion for a new trial was granted on May 4, 1934, extending the time within which the plaintiff might file a motion for a new trial to thirty days from May 4, 1934 (R. 90). On July 3, 1934, the plaintiff filed a motion for a new trial, which was overruled by the Court on October 15, 1934 (R. 90).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Claims erred:

1. In holding that the partnership agreement did not provide for the sale of a deceased partner's interest to the surviving partners.

2. In holding that the payments made to the estate represented gains or profits derived from the use of property belonging to the estate.

3. In failing and refusing to hold that the payments made to the estate represented a return of capital.

4. In failing and refusing to hold that the imposition of the income tax was double taxation.

5. In holding that the payments made to the estate were taxable income.

SUMMARY OF ARGUMENT.

The death of the petitioner's testator dissolved the partnership of A. H. Bull & Company as constituted at the date of death, and his interest in the partnership became a capital asset of his estate. The partnership having been dissolved, the duty devolved upon the surviving partners to pay to the executor of the deceased partner for the deceased partner's interest and a concurrent duty devolved upon the executor to collect the deceased partner's interest as a part of the duty devolving upon him to collect all property belonging to the decedent and passing under his will. The partnership agreement provided for a sale contingent upon death of a deceased partner's interest as an asset to the survivors constituting a new partnership, the members of which were obligated to pay the purchase price required by such sale.

The partnership agreement provided, in the case of the death of a partner, a choice of two methods to be followed in the liquidation of the interest of a deceased partner. One of these methods must be followed, and it was the executor's right to elect which method would be adopted, and he accordingly made his choice. The surviving partners were jointly and severally bound by the election of the executor as to the method and were obliged to pay out to the executor whatever amount was due by adopting the elected method.

The amount received was, under the income tax laws, merely a return of capital. If there is one principal of income tax law which may be taken as axiomatic, it is the principal that where there is no gain there is no income, and that where a conversion of a capital asset takes place, there can be no gain until after the value of the capital asset has been received, the value of such capital asset being its value at the beginning of the period under consideration. In other words, there is no income without gain and there is no possibility of gain until there has been a return of capital; therefore, when there has been a conversion of a capital asset and the amount received at the end of the period does not exceed the value of the said asset at the beginning of the period, there is no gain and therefore no income.

Moreover, the amount received was merely the value in money, of property received by bequest and sold immediately upon receipt. The value of property received by bequest is expressly exempt from being considered as income. The exemption applies to the value of the property received, and in this instance, less than the value at the beginning of the period, was received. This would clearly bring the amount received within the exemption.

The estate's claim against the partnership was corpus; just as much as any other piece of property passing under the will of the testator and could not at the same time be income. As such corpus it was properly subjected to payment of an estate tax, which is merely a transfer tax, and a tax which may only be levied upon that part of a decedent's property which is corpus.

The amounts received by the estate in liquidation of its claim cannot be transformed into income merely by calling it income. In order to be taxable as income under the taxing statutes it must, in truth, and reality, be income and must conform to that definition of income which has been developed over a long period of years by this Court

and the lower federal courts. It is fundamental that the return arising from the conversion of capital, becomes income only when and to the extent that it exceeds the value of the property from which it is derived. If the contention of the Government that the amount received represents income derived from the use of property in the partnership business, is correct, then *Eisner* v. *Macomber*, 252 U. S. 189, and all the cases following it and adopting its definition of income must be jettisoned.

ARGUMENT.

POINT I.

The Death of Petitioner's Testator Dissolved the Partnership and Capitalized Any Interest Which the Decedent Had in the Partnership.

The death of Archibald H. Bull on February 13, 1920, dissolved the partnership of A. H. Bull & Company as then constituted.

The respondent in the court below conceded that the death of a partner terminated the partnership relationship. There is, therefore, no dispute between the parties as to whether or not the partnership was dissolved by the death of Archibald H. Bull.

The partnership having been dissolved, the deceased partner's interest therein became an asset of his estate and as such asset had a value which was determined by the Commissioner. Since the petitioner's death had the effect of capitalizing all the property which he owned at the time of his death, this interest in the original partnership became capital, and as such capital and not as income it was received by the estate. The procedure which was followed in this case was that the surviving partners acquired the entire business, goodwill, existing contracts and whatever other property belonged to the partnership at the time of death under a defined method which was set

forth in the partnership agreement. In other words, by the obligation to pay the estate a sum measured by the profits which the deceased would have received had he lived, as provided in the agreement, the surviving partners purchased an asset of the estate. The amount received by the estate as the purchase price paid for the asset could not have been income unless the amount received had been in excess of the value placed upon the partnership interest by the Commissioner.

In Matter of Lee, 215 App. Div. (N. Y.) 576, the court had under consideration the question of whether or not an estate had received income and was liable for the payment of income tax where the estate had received an amount equal to the share of the net profits, for a certain period, which a deceased partner would have received if living, as payment of deceased partner's interest in the firm. In deciding this question, the court said at page 578:

> "The sum so paid was in no sense income. 'Income may be defined as the gain derived from capital, from labor or from both combined.' (*Eisner* v. *Macomber*, 252 U. S. 189.) The estate had no capital invested in the new partnership. It had no interest in the business of the partnership; in its profits or in its losses. Certainly, it performed no labor in connection therewith. There was nothing of which the sum paid was the 'outcome' to those who paid it, or 'income' to those who received it. It was a capital sum paid to purchase and extinguish the interest of George C. Lee at the time of his death in the good will of the old partnership. It was not a sum properly constituting a basis for the income tax imposed and paid."

The relationship between the estate and the surviving partners was one of creditor and debtor. The sums which were paid by the surviving partners from time to time to the estate were payments on the amount of this debt.

The legal effects flowing from a similar state of facts was set out with great care by Judge Dickinson sitting

in the District Court for the Eastern District of Pennsylvania in the case of the *United States* v. *Wood, et al.*, 8 F. Supp. 939. The Court summed up the facts as follows:

> "Defendant's decedent was a member of a partnership. Had he lived, it may be assumed that a sum representing his share of partnership profits would have been allotted to him at the first of the year following the date of his death. At the time of his death, such allotment had not been made, although in the offing. The regular time for the closing of the books was the end of the year. The decedent died February 17, 1926. When the books were closed in December, 1926, it became known that decedent's share of the profits from the last profit-sharing date to the date of his death was the sum for which suit is brought. This sum was included in the value of his estate as principal, and death taxes paid thereon. The United States now claims it was income and taxable as such." (p. 940).

In its conclusion, the court stated:

> "The fallacy which underlies the whole argument is that the nature of what a thing is can be changed by changing the name by which you choose to call it; in other words, anything can be made income by the simple expedient of calling it by that name. The underlying inquiry is, What is an interest in a partnership? It is nothing more nor less than the right to call upon the copartners for an accounting. The sole right of the representative of a deceased partner is to call upon the surviving partners to account for the assets of the partnership in their hands. There might have been gains or losses, and almost surely both gains and losses, with a net result one way or the other. A balance could be struck in favor of or against the deceased partner. If in his favor, it might be made up of the accumulations of undistributed profits for many years. It might develop that the profits of the last year's business made up the whole balance; the business up to the last year showing in the red. In the settlement of the decedent's estate, his interest in

the partnership would be inventoried at its appraised value. His executor would be chargeable with what he received for it. The question is whether the decedent's estate would in either of the events we have instanced be chargeable with an income tax on the sum eventually received from the partnership as income received by him. That it was part of his estate, and taxable as such, could readily be found, but that what the value of his partnership interest turned out to be was income which the decedent had received and upon which he owed an income tax is a thought difficult to grasp. . . . Furthermore a law which imposes a tax on income imposes no tax on what is not income, and the interest of a deceased partner in a firm, while it is part of his estate is not taxable income within the meaning of the income tax laws, nor is any part of it. . . . A partnership is an entity. It may have received gains, but those gains (or his proportionate share of them) do not become income to the individual partner until set apart to, and received by, him. Before that they are income to the partnership but not income to the individual partners. If the partnership is dissolved by the death of a partner, the sole right of the estate of the deceased partner, as we have already said, is to require the surviving partners to account for the share of the decedent in the partnership assets. That share is part of his estate but is assuredly not income. . . .

"Accepting the doctrine that a partner's share of partnership profits is taxable income, whether distributed or not, the share of profits may be said to be income because it is income. When, however, a partner's share in a dissolved partnership is ascertained by the difference between what is realized from its assets and the sum of its debts, how can such a balance be held to be income?

"The whole argument may be summed up in this very narrow distinction. If a sum of money comes to a decedent's estate from a partnership of which the decedent was a member as money to which the decedent in his lifetime had a right as income, it is income upon which a tax may be assessed against a decedent's estate precisely as it might have been as-

sessed against him had he lived. If, however, the sum received represents the share of the decedent in the assets of the partnership, it is principal, and no part of it is made income to the decedent by the mere fact that included in the assets were moneys which came to the firm as profits. To express this thought in the concrete, if the partnership had made profits his share in which was demandable by a partner, such sum would be income to the individual partner, but, if the firm was dissolved, then the share of each partner in the net assets would not be income to him, notwithstanding the fact that the assets included what were profits to the firm." (p. 941).

POINT II.

The Partnership Agreement Provided the Methods of Liquidating a Deceased Partner's Interest and Any Property Coming to the Estate in Payment of the Deceased Partner's Interest Represented Capital and Was Part of the Corpus of the Estate.

In drawing the partnership agreement, the partners obviously had in mind the fact that the death of a partner would dissolve the partnership, and that upon such dissolution it would be necessary to value the deceased partner's interest and to discharge such interest. Rather than leave such determination to the hazards and expense of an accounting and liquidation proceeding, the partners agreed among themselves that one of two methods should be followed in determining the deceased partner's interest: the business should be carried on by the surviving partners to the end of the calendar year and the estate of the deceased partner should receive the same interests as the deceased partner would if living, or the deceased partner's estate might withdraw the deceased partner's interest within thirty days after probate of the will and all adjustments should be made as of the date of withdrawal.

The surviving partners and the executor agreed to use the first method. In accordance with such agreement, the

surviving partners carried on the business and the executor did not demand an immediate accounting from the surviving partners.

This business was carried on by a new partnership composed of the surviving partners. The estate was not a member of the new partnership; it merely received from the new partnership payments in the liquidation of a capital asset. The members of the new partnership being jointly and severally obligated to make these payments.

The Court of Claims in the course of its opinion states:

> "The language of the agreement shows clearly, we think, that the estate of a deceased partner, if it elected not to withdraw the decedent's interest immediately, was to give up no rights with respect to the property of the deceased in the business at the date of death if profits should be earned by the continuance of the business by the surviving partner, or partners, for the remainder of the calendar year." (R. 88).

This statement by the Court is correct in part and erroneous in part. The estate did not give up any rights it had in deceased partner's interest at the date of death, but it did agree with the surviving partners that the only right it had, was a right to the payment of an amount equal to that proportion of the profits which the deceased would have been entitled to receive had he lived. This method of liquidating the deceased partner's interest was not dependent upon the earning of profits by the new partnership, if none had been earned the value of the estate would have been that much less. The executor could not agree to follow the one method and then at the end of the year, if he should learn that there were no profits, disaffirm the agreement and ask for a settlement under the other method. The estate took its chances, and having received its proportionate share of the profits for the agreed period, its interest was entirely liquidated and it had no further claim on the surviving partners. The estate could

only have sued as a creditor and had none of the rights, remedies or obligations of a partner.

The payments made to the estate were payments made in the purchase of a capital asset.

In *Hill* v. *Commissioner of Internal Revenue*, 38 F. (2d) 165, (C. C. A. 1st), cert. denied 281 U. S., 761; and in *Pope* v. *Commissioner of Internal Revenue*, 39 F. (2d) 420 (C. C. A. 1st) the court had under consideration similar cases, where it was agreed by the partners that on the death of a partner the surviving partners should acquire the interest of the deceased partner by paying to his estate an amount measured by the amount of profits which the deceased partner would have received had he lived. In both cases the Court held that the death of a partner dissolved the partnership and that the amount paid by the surviving partners to the estate of the deceased partner were payments made in the purchase of a capital asset.

The Government in its Brief in Opposition (p. 6) states that since in the cases cited, the partnership agreement specifically provided that the surviving partners should acquire an asset in return for a share of profits, that the cases are clearly distinguishable from the present case. The distinction lies not in the agreements made but in the form in which they were drafted. In the two cases cited the agreements were drawn with great care; in this case it was not. It is elementary that an agreement is what it is, not what it may be called, nor what it may at first glance seem to be. A lease is a lease, whether it be labelled a mortgage or quit claim deed, and a sale is a sale, however, inartificially the agreement of sale may be drawn. The agreement, no matter what its form, could not continue a partnership in contravention of law and could not create a taxable income for which no law provided.

The absurdity of the Government's contention may be seen if pushed to its logical extreme. If the payments received by the estate were income, and not a return of capital, then at the end of the period, when both the exe-

cutor and the surviving partners thought that there had been a complete discharge of their respective rights and liabilities, the deceased partner's interest remained exactly as it was at the beginning of the period, for the estate had merely received income on that interest, and the capital asset, the deceased partner's interest, remained intact, an asset of the estate which must be collected, a debt of the surviving partners which still must be paid.

POINT III.

The Amount in Question, Being An Amount Received in Conversion of a Capital Asset, Could Not Be Income Unless It Exceeded the Value of the Asset at the Beginning of the Period.

The Income Tax Law imposes a tax on income, and can reach nothing that is not income.

Since the passage of the first Federal Income Tax Statute, the courts have been unanimous in holding that the income tax applies only to income, and that unless the amount sought to be subjected to the tax is clearly income then the tax may not be imposed.

What is income and what is not has been time and again considered by this Court and the Circuit Courts of Appeals. The classic definition is the one found in *Eisner* v. *Macomber*, 252 U. S. 189, 207:

> "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets."

That definition has been "adhered to and applied repeatedly" *Bowers, Collector* v. *Kerbaugh Empire Company*, 271 U. S. 170, 174.

From this definition it is readily apparent that the first requisite to produce income is that there must be a gain. It is the *gain* derived from capital, from labor, or from

both combined, *not the capital or labor* from which it is derived which stamps it as income, and it is the *profit* gained through a sale or conversion of a capital asset which produces income not the sale or conversion. In short, there is no income unless there is a gain or profit.

In discussing the question of what is or is not income for the purposes of taxation the Court of Appeals for the District of Columbia in *Drier* v. *Helvering, Commissioner of Internal Revenue*, 72 F. (2d) 76, 77, said:

> "The Supreme Court has said that income is the gain derived from capital, from labor, or from both combined, and is to be taken to include profit gained through a sale or conversion of capital assets, *Eisner* v. *Macomber*, 252 U. S. 189, 207. And likewise that the income tax law is concerned only with realized gains. *Lucas* v. *American Code Company*, 280 U. S. 445, 449. This we take to mean that no income accrues unless there is gain or profit. Hence it is not every conversion of capital assets that produces income. 'In order to determine whether there has been gain or loss, and the amount of the gain if any, we must withdraw from the gross proceeds an amount, sufficient to restore the capital value that existed at the commencement of the period under consideration.' *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185."

And this Court in deciding that a certain transaction did not result in income said in the course of its opinion per Butler J., in *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 175, in effect stating the lack of such gain or profit was a clear indication that there was no income:

> "The transaction here in question did not result in gain from capital and labor, or from either of them, or in profit gained through the sale or conversion of capital."

In the present case if there was any income earned by the estate it must have been gain derived from capital or from the profit made through a sale of capital assets for

the element of labor is entirely lacking. The estate did not perform labor.

No income is derived from capital or from the sale or conversion of a capital asset, unless the value of the capital asset at the end of the period exceeds the value at the beginning of the period.

The question of income arising from gain through the sale or conversion of a capital asset was dealt with by this Court in the October term of 1920 in a series of four cases—*Merchants Loan & Trust Company* v. *Smietanka*, 255 U. S. 509; *Eldorado Coal & Mining Company* v. *Mager*, 255 U. S. 522; *Goodrich* v. *Edwards*, 255 U. S. 527, and *Walsh* v. *Brewster*, 255 U. S. 536.

In *Merchants' Loan & Trust Company* v. *Smietanka*, 255 U. S. 509, it was determined by the Court that *profit* realized by the sale of corporate stock is income, which profit was measured by the difference between the amount realized from the sale of the stock in 1917 less the capital investment as of March 1, 1913.

Eldorado Coal & Mining Company v. *Mager*, 255 U. S. 522, presented the same question and was decided upon the authority of *Merchants' Loan & Trust Company* v. *Smietanka, supra.*

Goodrich v. *Edwards*, 255 U. S. 527, dealt with the question of loss and gain on the sale of certain stocks, and the Court in deciding this case, after quoting the definition of income, found in *Eisner* v. *Macomber*, 252 U. S. 189, 207, said at page 535:

> "It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived therefrom by the vendor and * * * since no gain was realized on this investment by the plaintiff-in-error, no tax should have been assessed against him."

Walsh v. *Brewster*, 255 U. S. 536, dealt with the question of gain on the sale of certain bonds. In reaching its decision the Court said:

"It is stipulated that the market value of these bonds on March 1, 1913, was $164,480.00, and the Collector assessed the tax upon the difference between the selling price and this amount, but since the gain to the taxpayer was only the difference between his investment of $231,300.00, and the amount realized by the sale $276,150.00, under authority of No. 663, *Goodrich* v. *Edwards, Collector,* this day decided, he was taxable only on $44,850.00.

The District Court, however, held that any gain realized by the sale was a mere conversion of capital assets, and was not income, which could lawfully be taxed. In this respect the Court fell into error. The tax was properly assessed, but *only upon the difference between the purchase and the selling price of the bonds, as stated.*" (Italics supplied.)

The early recognition by this Court in the cases just cited of the fact that there was no gain realized in the sale or conversion of the capital asset until there had been a return of capital, has been consistently adhered to. It was re-affirmed in *McLaughlin* v. *Alliance Insurance Company,* 286 U. S. 244.

The application of these principles in a case involving a partnership interest is aptly illustrated in the case of *United States* v. *Carter, et al.,* 19 F. (2nd) 121 (C. C. A. 5). In that case the estimated fair value of the deceased partner's interest was returned for estate tax purposes. The actual value of that interest was subsequently determined to be in excess of the estimated fair value and the Commissioner attempted to assess an income tax upon the difference between the estimated value and the actual value on the theory that such difference represented income. The Court, in deciding that such increase did not represent income, said:

"The item in question was an integral part of the corpus of the estate, received and retained by the executors, not a gain or profit issuing and severed from a capital asset. It does not include any earnings or rev-

enue produced by capital after it came into the possession of the executors. It is not taxable as income, on the ground that it is the difference between the value of property at the time it was acquired and a higher value at which it was sold or otherwise disposed of. Being merely the amount of the difference between the estimated and actual value of an asset, which remains unconverted or undisposed of, it does not represent a profit or gain which is taxable as income."

The same rule would apply here. In this case the amount received did not equal the value placed upon the asset by the Commissioner. If the difference between estimated value and actual value would not be income it is manifest that the amount received in the liquidation of an asset which did not equal the value for estate tax purposes would not be income.

POINT IV.

Unless the Amount in Question was Income to the Estate, the Estate was Not Liable for the Payment of An Income Tax Upon the Said Amount. Income is Taxable Only to Those Persons to Whom It is Income.

In this case the estate received from the surviving partners certain moneys which had been profits earned by the business in which the new partnership was engaged. There is no question that these payments were made out of money, which, at one time, represented income. It represented income in the hands of the partners of the new partnership, because it was the profits which they had received from carrying on its business. It never represented income to the estate because the estate received it in exchange for a capital asset. It was the new partnership quid for the quo of the estate. The Government in its Brief in Opposition states on page 7:

"In the case at bar, the profits received by the estate would have been taxable to the decedent had he

> lived, and are income taxable to the estate, which stands in the decedent's place."

Such a proposition is fallacious. This litigation does not involve what would have happened had the decedent lived, but is concerned with what happened because he died. The estate does not stand in the decedent's place. It is a separate taxable entity, *Anderson* v. *Wilson,* 289 U. S. 20; *Long* v. *Commissioner,* 289 U. S. 109, and the taxing statutes are concerned only with the tax liability of the entity which they seek to tax. They are concerned, not with hypotheses, but with facts. Speculation as to who would have been taxable and to what extent in the event the facts had been different is fruitless.

As the Court of Appeals for the Eighth Circuit recently said in *Hartley* v. *Commissioner of Internal Revenue,* 72 F. (2d) 352 at page 355:

> "The important consideration is that the statutes establish or recognize certain entities for income taxation purposes—one of these being an estate of a decedent during administration and settlement—and the measure prescribed for determining taxable income arising from gains or losses through sale or other realization upon property by such an entity is confined to such gains or losses accruing to such entity and no other; they are not concerned with what has happened before the property became that of the entity being taxed."

Waud v. *United States,* 71 Ct. Cls. 567, may easily be distinguished from the case at bar. In the Waud case the decedent had until his death by agreement with other heirs received one-half of the net income of a trust estate created by his father's will, and after his death his estate received this income until the expiration of a certain period. The Commissioner assessed an estate tax on the value of the right to receive this income and subjected the estate to an

income tax upon the amount of income received from the trust estate. What the estate received was clearly income; not income because it would have been income in the hands of the decedent, in whose place the estate might be said to stand, but income because it was the amount earned by certain trust funds, which amount was received by the Trustee as income and paid to the beneficiaries as income. The fact that in the same case an estate tax had been levied upon the right to receive this income, has no bearing upon the present case, because at the end of the period in which the estate was to receive income, the corpus would still be intact. In the present case the corpus had been translated into money at the end of the period and was no greater than its value at the beginning of the period.

Similarly, *Irwin* v. *Gavit,* 268 U. S. 161, may be distinguished from the present case, for in that case income from a fund in trust was bequeathed for a period of years. The decision of the Court went upon the fact that the bequest was purely one of income and that the provision of the act exempting bequests from being considered as gross income "assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income, properly so-called, simply because of a severance between it and the principal fund." (p. 167).

The Revenue Act of 1918 provides that there shall not be included in gross income:

> "The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);" Section 213 (b) (3).

It matters not that the amount in question was income when earned by the surviving partners. "Incomes are taxed to and as the statutes provide, their terms and not analogies control." *Saenger* v. *Commissioner of Internal Revenue,* 69 F. (2d) 631, 632. Income tax on the profits

was payable by and only by the surviving partners for they were the only ones to whom it was income. There exists no authority in law for subjecting one person to the payment of another's tax. This Court in disposing of a similar question has stated:

> "That which is not in fact the taxpayer's income cannot be made such by calling it income." *Hoeper* v. *Tax Commission, Wis.*, 284 U. S. 206, 215.

POINT V.

Having Been Determined to be Corpus and An Estate Tax Having Been Paid Thereon the Amount in Question Should Not Be Subjected to An Income Tax.

The Commissioner was correct in determining that the property in question was corpus as it cannot be disputed that the interest of the estate in the partnership was an asset of the estate. The Commissioner determined the value thereof and such amount represented the value of decedent's interest in the partnership, which was clearly as much a part of the corpus of his estate as any other property, tangible or intangible, real or personal, which the decedent owned at the time of his death.

The Revenue Act of 1918, Section 402, provides that the value of the gross estate of a decedent shall be determined by including the value at the time of his death of all property "(a) To the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate." Thus, by statutory definition, the partnership interest was part of the corpus of the decedent's estate. It was subject to the payment of charges against his estate; it was subject to the expenses of administration of his estate; and it was subject to distribution as part of his estate.

Having once been properly classed as corpus, the asset in question could not be classed as income and any profit upon the sale or liquidation thereof is limited to the excess of the value at the time of death, as determined by the Commissioner. *Burnett* v. *Logan*, 283 U. S. 404, 413, 414.

> *"When, therefore, an item is properly determined to constitute a part of the gross estate of a decedent for estate tax purposes, it cannot by any sort of reasoning be made to constitute a part of the income of the same estate. It is a part of the corpus."* Nichols v. United States, 64 Ct. Cls. 241, 245.

To further subject the amount to the payment of an income tax would amount to double taxation, against which there exists a strong presumption, except where the language of the statute clearly calls for such double taxation. Said the Court in *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, pp. 195, 196:

> "The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above $40,000, *i. e.*, an income tax and an estate tax. Such a duplication even in an exigent war tax measure is to be avoided unless required by express words."

The Government in its brief in opposition states that there is clearly no objectionable double tax, because of the fact that the estate tax and the income tax are levied upon different things and under different principles, citing *Waud* v. *United States*, 71 Ct. Cls. 567, 570. This statement of principle is entirely correct, but the principle was not applied in this case. The same thing has been taxed twice; the value of the decedent's interest in the partnership as part of the corpus of the estate, and the same value when liquidated and received as money, as income of the estate. It is because of this double levy on the same thing which was of unchanging value, that there is objectionable double taxa-

tion. The oppressiveness of double taxation is aggravated here, because in computing the estate tax no deduction was made for income tax, and charitable contributions to the extent of $127,019.54 were never deducted.

POINT VI.

The Amount, Being the Value of Property Received by Bequest, May Not Be Taxed as Income Because of Statutory Exemption.

Section 213 (b) (3) of the Revenue Act of 1918 provided that "the value of property acquired by gift, bequest, devise or descent" shall not be considered as gross income. The value of the petitioner's testator's interest in the partnership of A. H. Bull & Company was the value of property acquired by bequest.

Upon the testator's death, his interest in the partnership, together with all other personal property belonging to him, vested in his executor; but, at the same time, the right to receive this property vested in the legatees named in his will, and therefore, the value of the partnership interest, the same as any other personal property interest passing under the will, came to the legatees by bequest. *Brewster* v. *Gage*, 280 U. S. 327, 335.

The respondent in the court below contended that the property was not received by bequest, because title to it first vested in the executors. There is nothing on which to postulate this contention, as is shown by the decision in *Brewster* v. *Gage, supra*, wherein the Court through Mr. Justice Butler said:

> "The decree of distribution confers no new right; it merely identifies the property remaining, evidences the right of possession in the heirs, or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death."

The exemption provided by the statute is clear and any attempt to narrow the exemption has been condemned by this Court. In *Burnett v. Whitehouse*, 283 U. S. 148, the Court speaking through Mr. Justice McReynolds, said at page 151:

> "The exemption in Section 213 is plain and should not be destroyed by any strained construction of general language found in Section 219."

To say that the amount in question was not the value of property received by bequest is to disregard substance and give undue importance to form. It amounts to stating that beneficiaries do not own property, the naked title to which is temporarily in a trustee.

In *Burnett* v. *Logan*, 283 U. S. 404, this Court had under consideration a very similar question. In that case the taxpayer had received under her mother's will, a right to share in the possible proceeds of a contract to pay indefinite sums, which were part payment for shares of stock which had been sold, partly for cash and partly for the said payments. For Estate tax purposes the value of this contract was assumed to be $277,164.50, and the transfer was taxed at that rate. The Commissioner attempted to levy an income tax on the amounts received as further payments under this contract. The Court held that there was no income until the value placed upon the contract for Estate tax purposes had been received, saying, through Mr. Justice McReynolds, at pages 413, 414:

> "From her mother's estate Mrs. Logan obtained the right to share in possible proceeds of a contract thereafter to pay indefinite sums. The value of this was assumed to be $277,164.50 and its transfer was so taxed. Some valuation—speculative or otherwise—was necessary in order to close the estate. It may never yield as much, it may yield more. If a sum equal to the value thus ascertained had been invested in an annuity contract, payments thereunder would have

been free from income tax until the owner had recouped his capital investment. We think a like rule should be applied here. The statute definitely excepts bequests from receipts which go to make up taxable income. See *Burnett* v. *Whitehouse*, *ante*, p. 148."

CONCLUSION.

The amount which the estate received was received in payment for the acquisition of a capital asset and never was income of the estate. The amount the estate received was the value of property received by bequest and as such it was expressly exempted from being included in gross income.

It is respectfully submitted that the decision of the Court of Claims is erroneous and should be reversed.

DAVID A. BUCKLEY, JR.,
Attorney for Petitioner.

LORING M. BLACK,
H. RUSSELL BISHOP,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	8
Appendix (statutes)	9

CITATIONS

Cases:	
Bull v. *Commissioner*, 7 B. T. A. 993	6
City Bank Farmers Trust Co. v. *Commissioner*, 29 B. T. A. 190	7
Darcy v. *Commissioner*, 66 F. (2d) 581, certiorari denied, 290 U. S. 705	7
First Trust of Omaha v. *United States*, 76 C. Cls. 481	7
Hill v. *Commissioner*, 38 F. (2d) 165, certiorari denied, 281 U. S. 761	7
Irwin v. *Gavit*, 268 U. S. 161	7, 8
Nichols v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584	7
Pope v. *Commissioner*, 39 F. (2d) 420	6
United States v. *Carter*, 19 F. (2d) 121	7
Waud v. *United States*, 71 C. Cls. 567	7, 8
Statutes:	
Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, 1070, 1071:	
Sec. 213	9
Sec. 218	9
Sec. 219	10

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND Trustee of the Estate of Archibald H. Bull, Deceased, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 87–89) is reported in 6 F. Supp. 141.

JURISDICTION

The judgment of the court below was entered March 5, 1934 (R. 89). A motion for a new trial was overruled October 15, 1934 (R. 90). The petition for a writ of certiorari was filed January 15,

1935 (R. 90). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

The decedent was a member of a partnership. By the partnership agreement his estate was given the option of sharing in the profits and losses of the business for a year after his death, or of withdrawing. The question presented is whether a share in the profits earned by the business subsequent to the decedent's death and paid to his estate constitutes taxable income to the estate.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 9–10.

STATEMENT

The findings of fact of the Court of Claims (R. 83–86) may be summarized as follows:

The petitioner is the duly qualified and acting sole surviving executor and trustee of the estate of Archibald H. Bull, a citizen and resident of New Jersey, who died testate on February 13, 1920 (R. 83).

Until his death the decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). The partnership was created by written agreement of January 9, 1918, providing that the partnership was to begin January 1, 1918, and continue for one year from that

date (R. 84). After December 31, 1918, the partnership continued to operate from year to year by mutual consent of the partners without any further agreements (R. 84). The partnership agreement provided:

> that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as the date of such withdrawal (R. 84).

The first method set out in the partnership agreement was followed by the surviving partners and the estate up to December 31, 1920 (R. 84). The intent and meaning of the agreement were that the surviving partner or partners and the estate of the deceased partner might permit the interest of the decedent to remain in the business to the end of the calendar year in which he died (R. 84).

The partnership was engaged in the ship brokerage business, for which no capital was required

and none was ever invested by the partners (R. 84). At the decedent's death, February 13, 1920, his share of the partnership profits in connection with business transacted from January 1, 1920, to his death, amounted to $24,124.20 (R. 84). The decedent had no other accumulated profits in the business and owned no other tangible property in connection therewith (R. 84). Thereafter the decedent's estate received $212,718.79 from the surviving partners, that amount being the portion of the profits of the business carried on by them from February 13 to December 31, 1920, which the decedent would have been entitled to receive for that period if he had lived (R. 84–85). Of the amount last named, $200,117.09 was received during the period mentioned, and $12,601.70 was received during the first two months of 1921 (R. 85). The decedent's estate received no further sums from the operation of the business subsequent to February 13, 1920, and all interest of the estate in the earnings and property of the business terminated at December 31, 1920 (R. 85).

In filing an estate-tax return, the decedent's executor included the decedent's interest in the partnership at a value of $24,124.20, which represented the decedent's share of the earnings accrued to the date of the decedent's death (R. 85). The Commissioner valued such interest at $235,202.99, arrived at by increasing the value by $212,718.79, the total thus representing the full amount received by the estate from the surviving partners (R. 85).

The estate tax on this increased amount was $41,517.45 (R. 85).

On April 14, 1921, the petitioner filed an income-tax return for the estate for the period from February 13, 1920, to December 31, 1920, which did not include the amount of $200,117.09 received during the period for which the return was filed as the share of the profits earned by the partnership (R. 85). The estate employed the cash receipts and disbursements method of accounting (R. 85.)

In July 1925 the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified the petitioner of a deficiency in income tax due from the estate for that period, in the amount of $261,212.65, which was due, in part, to the inclusion of that amount as taxable income, and, in part, to adjustments not in controversy here (R. 85). No deduction was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death (R. 85).

On September 5, 1925, the petitioner appealed to the United States Board of Tax Appeals from the deficiency asserted by the Commissioner (R. 85). The Board affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income without any deduction on account of the value of the decedent's interest in the partnership at his death, and determined a deficiency of $55,166.49.

Bull v. *Commissioner*, 7 B. T. A. 993 (R. 85–86). The deficiency was paid with interest of $7,510.95 on April 14, 1928 (R. 86).

On July 11, 1928, the petitioner filed a claim for refund of $62,677.44 on the ground that the item of $200,117.09 was corpus and had been erroneously included as income to the estate (R. 86). The claim was rejected May 18, 1929 (R. 86).

The court below dismissed the petition (R. 89).

ARGUMENT

The petitioner contends that the amount taxed as income to the estate of the decedent represented the purchase price paid by the surviving partners for a capital asset, and was, therefore, not income to the estate. The court below, however, construed the partnership agreement as providing, not for such a purchase, but only for a method of continuing the business by which the estate of a deceased partner would receive the share of profits that the deceased would receive if living. We submit that, considering the nature of the business, the court below correctly interpreted the agreement. No principle for the construction of such an agreement was misconceived or misapplied, and we submit that the case does not merit review.

Since the partnership agreement, as properly interpreted, did not provide for a purchase of an asset in return for a share in the profits, cases in which the partnership agreement did so specifically provide are clearly distinguishable. *Pope* v.

Commissioner, 39 F. (2d) 420 (C. C. A. 1st); *Hill* v. *Commissioner*, 38 F. (2d) 165 (C. C. A. 1st), certiorari denied, 281 U. S. 761; *City Bank Farmers Trust Co.* v. *Commissioner*, 29 B. T. A. 190.

In the case at bar, the profits received by the estate would have been taxable to the decedent had he lived, and are income taxable to the estate, which stands in the decedent's place. The amount taxable is not limited to the excess over the amount included in the estate for the estate tax. *Waud* v. *United States*, 71 C. Cls. 567; cf. *Irwin* v. *Gavit*, 268 U. S. 161. If there was error in the computation of the estate tax, it is not material now. The present suit is concededly untimely in that respect. If error was made in the estate-tax return, that should furnish no occasion for a compensating error in the income-tax case.

Cases involving profits of a deceased partner accrued before his death, or the interest of a deceased partner in the profits from business not completed at his death, clearly do not control the present case. Cf. *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584; *United States* v. *Carter*, 19 F. (2d) 121 (C. C. A. 5th). Such amounts, we think, are taxable income to the decedent. *First Trust Co. of Omaha* v. *United States*, 76 C. Cls. 481; cf. *Darcy* v. *Commissioner*, 66 F. (2d) 581 (C. C. A. 2d), certiorari denied, 290 U. S. 705.

We submit that the petitioner may not claim exemption under Section 213(b)(3) of the Revenue

Act of 1918 (*infra*, p. 9) on the ground that the profits paid to the estate were acquired by bequest. Even if the estate could be considered as receiving the amounts by bequest as representative of the beneficiaries of the will, still, if the amounts constituted income rather than corpus, they would be taxable under the decision of this Court in *Irwin* v. *Gavit, supra.*

We submit that there is clearly no objectionable double taxation, for the estate tax and the income tax are levied upon different things and under different principles. *Waud* v. *United States, supra,* p. 570. Nor is there any attempt to subject one person to the payment of another's tax.

CONCLUSION

We submit that the decision below is correct. There appears to be no conflict of decisions. There is no question presented meriting review. The petition should therefore be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
J. R. FILLMAN,
Special Assistants to the Attorney General.

FEBRUARY 1935.

APPENDIX

REVENUE ACT OF 1918, C. 18, 40 STAT. 1057, 1065, 1070, 1071

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * * *

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or

not, of the net income of the partnership for the taxable year.

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(b) The fiduciary shall be responsible for making the return of the income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1933

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	6
Argument:	
I. Partnership profits received as such constitute taxable income	7
II. The amount of partnership profits taxable as income is not limited to the excess over the amount included in the estate in computing the estate tax	15
Conclusion	20
Appendix	21

CITATIONS

Cases:	
Bull v. *Commissioner*, 7 B. T. A. 993	6
Burnet v. *Logan*, 283 U. S. 404	12, 18
Burwell v. *Mandeville's Executor*, 2 How. 560	11
Burnet v. *Whitehouse*, 283 U. S. 148	18
Helvering v. *Butterworth*, 290 U. S. 365	11
Hill v. *Commissioner*, 38 F. (2d) 165, certiorari denied, 281 U. S. 761	13
Irwin v. *Gavit*, 268 U. S. 161	16, 17, 18
Ithaca Trust Co. v. *United States*, 279 U. S. 151	14
Nichols v. *United States*, 64 C. Cls., 241, certiorari denied, 277 U. S. 584	16
Pope v. *Commissioner*, 39 F. (2d) 420	13
United States v. *Carter*, 19 F. (2d) 121	14
United States v. *Supplee-Biddle Co.*, 265 U. S. 189	16
United States v. *Wood*, 8 Fed. Supp. 939	12
Waud v. *United States*, 71 C. Cls. 567	16, 17
Statutes:	
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Sec. 213	21
Sec. 218	21
Sec. 219	22
Miscellaneous:	
G. C. M. 7616, IX–1 Cumulative Bulletin 219	8

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 649

ERNEST M. BULL, SOLE SURVIVING EXECUTOR AND Trustee of the Estate of Archibald H. Bull, Deceased, petitioner

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 87–89) is reported in 6 F. Supp. 141.

JURISDICTION

The judgment of the court below was entered March 5, 1934 (R. 89). A motion for a new trial was overruled October 15, 1934 (R. 90). The petion for a writ of certiorari was filed January 15, 1935 (R. 90), and was granted March 4, 1935. The

jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The decedent was a member of a partnership. By the partnership agreement his estate was given the option of sharing in the profits and losses of the business for a year after his death, or of withdrawing. The question presented is whether a share in the profits earned by the business subsequent to the decedent's death and paid to his estate constitutes taxable income to the estate.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 21–22.

STATEMENT

The findings of fact of the Court of Claims (R. 83–86) may be summarized as follows:

The petitioner is the duly qualified and acting sole surviving executor and trustee of the estate of Archibald H. Bull, a citizen and resident of New Jersey, who died testate on February 13, 1920 (R. 83).

Until his death the decedent was a member of the partnership of A. H. Bull & Company, ship agents and brokers (R. 84). The partnership was created by written agreement of January 9, 1918, providing that the partnership was to begin January 1, 1918, and continue for one year from that date

(R. 84). After December 31, 1918, the partnership continued to operate from year to year by mutual consent of the partners without any further agreements (R. 84). The partnership agreement provided (R. 84):

> that in the event of the death of any one of the said copartners, the surviving partner or partners shall be at liberty to continue said business, and the estate of the deceased partner shall receive the same interests, or participate in the losses to the same extent, as said deceased partner would, if living, based on the usual method of ascertaining what the said profits or losses would be for one year subsequent to the death of the said partner or partners. Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will or letters of administration, and all adjustments of profits or losses shall be made as the date of such withdrawal.

The first method set out in the partnership agreement was followed by the surviving partners and the estate up to December 31, 1920 (R. 84). The intent and meaning of the agreement were that the surviving partner or partners and the estate of the deceased partner might permit the interest of the decedent to remain in the business to the end of the calendar year in which he died (R. 84).

The partnership was engaged in the ship brokerage business, for which no capital was required and

none was ever invested by the partners (R. 84). At the decedent's death, February 13, 1920, his share of the partnership profits in connection with business transacted from January 1, 1920, to his death, amounted to $24,124.20 (R. 84). The decedent had no other accumulated profits in the business and owned no other tangible property in connection therewith (R. 84). Thereafter the decedent's estate received $212,718.79 from the surviving partners, that amount being the portion of the profits of the business carried on by them from February 13 to December 31, 1920, which the decedent would have been entitled to receive for that period if he had lived (R. 84–85). Of the amount last named, $200,117.09 was received during the period mentioned, and $12,601.70 was received during the first two months of 1921 (R. 85). The decedent's estate received no further sums from the operation of the business subsequent to February 13, 1920, and all interest of the estate in the earnings and property of the business terminated at December 31, 1920 (R. 85).

In filing an estate-tax return, the decedent's executor included the decedent's interest in the partnership at a value of $24,124.20, which represented the decedent's share of the earnings accrued to the date of the decedent's death (R. 85). The Commissioner valued such interest at $235,202.99, arrived at by increasing the value by $212,718.79, the total thus representing the full amount received by the estate from the surviving partners (R. 85).

The estate tax on this increased amount was $41,517.45 (R. 85).

On April 14, 1921, the petitioner filed an income-tax return for the estate for the period from February 13, 1920, to December 31, 1920, which did not include the amount of $200,117.09 received during the period for which the return was filed as the share of the profits earned by the partnership (R. 85). The estate employed the cash receipts and disbursements method of accounting (R. 85).

In July 1925, the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified the petitioner of a deficiency in income tax due from the estate for that period, in the amount of $26 ,212.65, which was due, in part, to the inclusion of that amount ($200,117.09) as taxable income, and, in part, to adjustments not in controversy here (R. 85). No deductions was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death (R. 85).

On September 5, 1925, the petitioner appealed to the United States Board of Tax Appeals from the deficiency asserted by the Commissioner (R. 85). The Board affirmed the action of the Commissioner in including the item of $200,117.09 in taxable income without any deduction on account of the value of the decedent's interest in the part-

nership at his death, and determined a deficiency of $55,166.49. *Bull* v. *Commissioner*, 7 B. T. A. 993 (R. 85–86). The deficiency was paid with interest of $7,510.95 on April 14, 1928 (R. 86).

On July 11, 1928, the petitioner filed a claim for refund of $62,677.44 on the ground that the item of $200,117.09 was corpus and had been erroneously included as income to the estate (R. 86). The claim was rejected May 18, 1929 (R. 86).

The court below dismissed the petition (R. 89).

SUMMARY OF ARGUMENT

The challenged tax is imposed upon partnership profits distributed to the estate of a deceased partner. Such profits are clearly income in the ordinary case, but petitioner contends that since the estate had the right to receive them, and such right was valued as a part of the decedent's gross estate for estate tax purposes, the receipts may not be taxed unless in excess of that value.

Upon analysis, it appears that the right of the estate to receive these profits was a proprietary right, which came into existence when the estate elected to have the business continued without the withdrawal of the decedent's interest. Hence, the right of the estate was not different in character from the right of the decedent, while he was living.

Petitioner contends that only the excess of profits over the value of the decedent's interest in the business at the time of his death may be treated as taxable income. Even if that be true, the amount

which the Commissioner has treated as income ($200,117.09) does represent only the excess of profits over what the Court has found to be the value of the decedent's interest in the business at the time of his death ($24,124.20). The rule for which petitioner contends has accordingly been satisfied.

We submit, however, that there is no requirement of the statute or regulations that limits the taxable income to the excess over the value of the decedent's interest at death. The right to future profits is a right to receive income, and there is authority in the decided cases for taxing income, properly so-called, even though the principal which produced it be a bequest, and also despite the fact that the transfer of the right to receive it had been taxed as part of the estate.

ARGUMENT

I

PARTNERSHIP PROFITS RECEIVED AS SUCH CONSTITUTE TAXABLE INCOME

What has here been taxed is a share in the profits of a partnership or joint venture. We submit that the estate had a proprietary interest in the business, that it received the profits *qua* profits, and that such profits are taxable to the estate in the same manner and to the same extent as they would have been taxed to the decedent had he lived and received them.

The partnership agreement here involved provided that in the event of the death of any one of the partners, his estate should have the option of withdrawing his interest within 30 days or, with the consent of the surviving partners, the business could continue. The estate elected to continue the business, and we submit that the venture then organized had the essential characteristics of a partnership. See G. C. M. 7616, IX–1 Cumulative Bulletin 219. The estate "received the same interests, or participated in the losses to the same extent, as said deceased partner would, if living." There was joint liability, and the sharing of profits. No new partnership agreement was drawn, and the relationship therefore rests upon a somewhat informal understanding,[1] but enough appears, we think, to support the conclusion that the estate elected to leave in the business what it was entitled to withdraw, to put it at the risk of the venture and to share in the profits or losses in the same capacity as the surviving partners. In this view there is nothing to distinguish the share of the profits of the business paid to the estate from the same share of the profits paid to the decedent while he lived. It is not questioned that the profits of a partnership are taxable to the partners, but petitioner contends that the character

[1] The written partnership agreement in the record covered only the calendar year 1918, and the business was thereafter continued from year to year by mutual consent without any further agreement. (R. 84.)

of the profits has been changed because the estate had a right to receive them, which was a capital asset, and hence there is no element of income involved until the value of the right is exceeded by the payments.

It is the position of the petitioner that this change in the character of the profits is due to the fact that the surviving partners purchased an asset of the estate, namely, the interest of the deceased partner. The court below, however, construed the partnership agreement differently. In its view the agreement provided only for a method of continuing the business by which the estate of a deceased partner would receive the share of the profits that the decedent would have received, if living, and that the estate, if it elected not to withdraw the decedent's interest immediately, was to give up no rights with respect to the property of the deceased in the business at the date of death (R. 88). The pertinent language of the agreement is quoted in the Statement hereinabove on page 3.

The partnership was engaged in the ship brokerage business and it appears that no capital was required and that none was invested by the partners. Whether the decedent's interest was withdrawn within thirty days of his death or at the end of the current year, it appears that the agreement contemplated that it should consist of a share in the accumulated profits on the agreed date, and that the partners had agreed among themselves that any

good will, interest in unexpired contracts or other intangibles, should belong exclusively to the so-called partnership entity, and that no partner should have any individual interest therein.

Accordingly, when the estate in this case elected not to withdraw the deceased partner's interest, it retained all property rights of the decedent. It retained what it would have lost by withdrawing, and it sold nothing to the survivors. Nor did the estate contract with the surviving partners that the only property it should have was a right to share in the profits. The decedent had already arranged that. The estate accepted the situation, as it necessarily resulted from the partnership agreement, and agreed to take the chance that the accounting at the end of the year would prove more profitable than an accounting within thirty days. We submit that the view of the court below is correct; that the estate had nothing to sell to the survivors, and that it sold nothing to them.

The petitioner ignores the fact that the decedent while he lived, and the surviving partners after he died, all had rights to receive the profits. The estate's right to receive the profits was of the same character.

The decedent had no property right in the partnership profits to be earned after his death. The right here involved never arose until the death of the decedent. It came into existence only when the estate elected to become associated with the surviving partners in the conduct of the business.

Upon the decedent's death the estate had a right to an accounting of the decedent's then existing share of the partnership profits. For reasons satisfactory to the estate, it decided to occupy the position of proprietor in the business, with the accompanying rights and liabilities. This Court has held that such an election is not to be treated as a sale, and that the proceeds may be taxed as income without reduction for the value of the right surrendered. *Helvering* v. *Butterworth*, 290 U. S. 365.

There was no debtor-creditor relationship here between the estate and the surviving partners. They were all associated together in a common enterprise, and the rights of the estate were no different from the rights of the surviving partners. Each was entitled to an accounting for a share of the profits. If the operation of the business had resulted in a loss, the estate would have shared therein, at least to the amount of earnings accrued to the deceased partner at the date of his death. *Burwell* v. *Mandeville's Executor*, 2 How. 560. The surviving partners as individuals were under no obligation whatever to the decedent's estate. As co-proprietors they were under the same obligation to the estate that they were to each other. Hence, the right to share in the profits of the business which belonged to the estate was no different from the right of the surviving partners and no different from the right of the decedent before he died. As one of the proprietors, the estate was entitled to a

share in the earnings. It sold nothing for which it was being paid, and if it made an investment in the business, it was limited to the $24,124.20 which had accrued at the date of the decedent's death; that was the value of the decedent's interest in the business. The estate received from the business $24,124.20 which has not been taxed, thus satisfying the rule applied in *Burnet* v. *Logan,* 283 U. S. 404, that only the excess over the capital value of property received from a decedent is taxable income. In addition, the estate received $200,117.09 as a portion of the profits. This latter amount has been taxed, and we submit, rightly so, as profits from a business received by one entitled to them in the capacity of an owner. As the court said in *United States* v. *Wood,* 8 F. Supp. 939, 940 (E. D. Pa.):

> Treating the decedent and his estate as distinct entities the thought can be followed that the share of profits paid by the firm to the estate was income to the estate from its investment in the partnership * * *

Where one partner dies having an investment in the business which he was entitled to withdraw, the right to withdraw it passes to his estate. Where, instead of withdrawing the deceased partner's interest, the estate leaves it in the business and the surviving partners acquire it by payments made to the estate, the transaction takes the form of a sale. In such a case the surviving partners individually acquire the deceased partner's interest. Any pay-

ments made to the estate out of partnership profits are for and on behalf of the individual partners. Accordingly, in such a case the surviving partners are taxable upon all of the partnership profits, and the estate is not. That was the situation in *Hill* v. *Commissioner,* 38 F. (2d) 165 (C. C. A. 1st), certiorari denied, 281 U. S. 761, and *Pope* v. *Commissioner,* 39 F. (2d) 420 (C. C. A. 1st).

But in this case the surviving partners have not purchased any partnership assets which belonged to the decedent. He had made no investment in the business and owned no tangible property in connection therewith (R. 84). Accordingly, the share of the partnership profits which was paid to the decedent's estate was not a consideration paid by the individual partners and was not paid to the estate for or on behalf of the surviving partners. Hence, the surviving partners would not be taxed upon all of the partnership profits, but only upon their distributive share and unless the decedent's estate is required to report as income the partnership profits distributed to it as such, that portion of the partnership profits will go untaxed.

When the decedent died he had an interest in the partnership. Notwithstanding the partnership agreement, the value of that interest for the purpose of the Federal estate tax was the value at the date of his death. The parties could not increase it by income subsequently earned and thus

build up a larger capital. What was earned subsequently by the business was not any part of the value of the decedent's interest at the date of his death. In this case the value at the date of death has been found by the Court of Claims as $24,124.20.[2] Though the parties agreed that what was earned later in the year should serve to augment the amount to be paid to the estate, we submit that the value of the partnership interest at the date of the decedent's death should not thereby be varied. The value of the decedent's interest was a constant, irrespective of any arrangement made between the surviving partners and the estate. *Ithaca Trust Co.* v. *United States*, 279 U. S. 151.

In *United States* v. *Carter*, 19 F. (2d) 121 (C. C. A. 5th)[3], it is not entirely clear whether the increase over the estimated value at the date of decedent's death was due solely to the correction of an erroneous estimate [4], or to the fact that the estate was entitled to a portion of the profits earned by the partnership subsequent to the death of the de-

[2] The court found that the decedent's share of the partnership profits at the date of his death was $24,124.20, and that he had no other tangible property in the business. (R. 84.) The value of the accumulated profits therefore represented the full value of the decedent's interest. And the petitioner so believed when a return for the estate tax was filed. (R. 85.)

[3] The decision was announced in 1927 but appears never to have been cited since.

[4] The fact that the tate proposed to file an amended return accounting for the increase would indicate that this was so.

cedent. If the case holds that partnership profits *paid as such* to the estate are not income, we submit that it is erroneous.

II

THE AMOUNT OF PARTNERSHIP PROFITS TAXABLE AS INCOME IS NOT LIMITED TO THE EXCESS OVER THE AMOUNT INCLUDED IN THE ESTATE IN COMPUTING THE ESTATE TAX

Even if it be assumed that the right to share in the future profits of the partnership was a property right of the decedent and was properly included in his gross estate for the purpose of computing the estate tax, we submit that the income tax was properly levied upon the receipt of partnership profits by the estate.

The estate tax is levied upon the transfer of the decedent's property at death and includes all property to the extent of the interest therein of the decedent at the time of his death. The income tax, of course, is levied upon the receipt of income and partnership profits are expressly included within the definition as gains or profits derived from the transaction of any business carried on for gain or profit. Section 213 (a), Revenue Act of 1918. We think it follows that the transfer of the right to receive income may be taxed under the estate tax and that the income upon receipt thereafter may be taxed as income.

The property which was taxed as a part of the estate was the deceased partner's interest in the

business, including the right of his estate to share in the future profits. The income tax here involved was levied upon the receipt of the fruits of that right. The two taxes are not only imposed under different principles but are levied in respect of different property. There is, therefore, no double taxation of the same property such as this Court avoided in *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, or as was discussed in *Nichols* v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584.

The principle for which we contend was applied by this Court in *Irwin* v. *Gavit*, 268 U. S. 161. There it was held that the income from a testamentary trust was taxable in the hands of the beneficiary and that the money taxed constituted the fruits of a legacy, and not the legacy itself. The decision establishes that exempt bequests consist of the right to receive income but that the income as it is received is taxable. So in this case the estate was not charged with income on account of the receipt of the right, but only when the estate received the partnership profits. It follows that the inclusion in the gross estate of the value of the right to receive the income does not affect the imposition of an income tax when the income is actually received.

That was the precise point decided in *Waud* v. *United States*, 71 C. Cls. 567. That case involved the income tax imposed upon an estate which received income from a trust fund, it appearing that

the value of the right to receive the income to the end of the term was valued by the Commissioner of Internal Revenue and included in the decedent's gross estate. Upon the authority of *Irwin* v. *Gavit, supra,* the Court of Claims held that the income from the trust fund was taxable when received by the estate.

The case at bar presents a situation substantially similar to that in the *Waud case.* The right to receive future income has been taxed as a part of the gross estate and the partnership profits have been taxed as income when received. Here, as in *Irwin* v. *Gavit* and *Waud* v. *United States,* the right was to receive income as such. In each case the receipt was contingent upon the production of income, and there is no immunity of income properly so called because of a severance between it and the principal fund. What has been taxed here is neither a bequest nor a capital receipt.

The petitioner's attempted distinction that in *Irwin* v. *Gavit* and *Waud* v. *United States* there were principal funds that remained intact after the payment of the income, is, we submit, not substantial, for in neither case did the recipient of the income either own or have any interest in the corpus or principal fund. The capital interest owned by the taxpayer in each case, as in the case at bar, was the right to receive the income—a right which, as in the case at bar, lost its value with the passage of time.

The distinction which makes inapplicable the decision in *Burnet* v. *Whitehouse,* 283 U. S. 148, is plain. There a definite sum was bequeathed each year in the form of an annuity, and it "did not depend upon income but was a charge upon the whole estate during the life of the legatee to be satisfied like any ordinary bequest." (P. 151.) This Court held that the annuity, when received each year, was exempt from income tax as a bequest. The amounts receivable by the legatee in the *Whitehouse case* were not income as ordinarily defined and within the reach of the statute, but rather represented a direct bequest of capital assets payable at intervals. Here, we submit, the amount received by the estate was clearly within the common definition of income.

The petitioner cites the decision of this Court in *Burnet* v. *Logan,* 283 U. S. 404, as controlling authority. There a legatee received a contract right to share in payments that would be made as and when ore was extracted from a mine. Aligning the case with *Burnet* v. *Whitehouse, supra,* rather than with *Irwin* v. *Gavit,* this Court held that payments received, which had not reached in amount the value placed on the contract right as of the time of the testatrix's death, were not taxable income to the legatee. We submit, however, that a number of circumstances remove the effect of the analogy to *Burnet* v. *Logan, supra.* The amounts paid under the contract in that case were promised to the de-

cedent as part of the price of stock purchased from her. (P. 410.) The payments represented a recoupment of capital investment, and the Court so held in the first part of the decision dealing with gain alleged to have been realized from such a sale. The right to periodic returns of capital assets the decedent left to her daughter. The promisor was still fulfilling the obligation to complete a purchase price when payments were made to the legatee. This Court considered the payments to be capital assets in the daughter's hands and applied the rule of *Burnet* v. *Whitehouse, supra.* There are no facts requiring a similar conclusion here. As shown earlier in the brief, the payments made to the estate by the surviving partners did not represent a purchase price. The decedent here had made no capital investment. The share of the partnership profits which his estate received would have been income to him if he had lived. In *Burnet* v. *Logan, supra,* however, the amounts received by the legatee would not have been taxable income to the decedent had she lived to receive them.

The petitioner's contentions that income could be realized only to the extent of amounts received in excess of the amount included in the gross estate, and that the amount here taxed was exempt as a bequest, do not differ in substance from the argument that the amount here taxed was corpus because it had been included in the gross estate.

We submit that the whole amount received by the estate was income and taxable under the rule

of *Irwin* v. *Gavit, supra.* Its character as income was not lost, in whole or in part, because it was used to measure the value of a right included in the decedent's gross estate.

CONCLUSION

The partnership profits were received by the estate as a proprietor in the business and were, therefore, taxable as income. Inclusion of the value of the right to receive the profits in the gross estate of the decedent did not affect their taxability as income to the estate. We submit that the decision below is correct and should be affirmed.

Respectfully submitted.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
JAMES W. MORRIS,
J. LOUIS MONARCH,
J. R. FILLMAN,
Special Assistants to the Attorney General.

APRIL 1935.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, 1070, 1071:

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 218. (a) That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his dis-

tributive share, whether distributed or not, of the net income of the partnership for the taxable year.

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(b) The fiduciary shall be responsible for making the return of the income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *.

U. S. GOVERNMENT PRINTING OFFICE : 1939

SUPREME COURT OF THE UNITED STATES.

No. 649.—October Term, 1934.

Ernest M. Bull, Sole Surviving Executor and Trustee of the Estate of Archibald H. Bull, Deceased, Petitioner,
vs.
The United States.
} On Writ of Certiorari to the Court of Claims.

[April 29, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

Archibald H. Bull died February 13, 1920. He had been a member of a partnership engaged in the business of ship-brokers. The agreement of association provided that in the event a partner died the survivors should continue the business for one year subsequent to his death, and his estate should "receive the same interests, or participate in the losses to the same extent," as the deceased partner would, if living, "based on the usual method of ascertaining what the said profits or losses would be. . . . Or the estate of the deceased partner shall have the option of withdrawing his interest from the firm within thirty days after the probate of will . . . and all adjustments of profits or losses shall be made as of the date of such withdrawal." The estate's representative did not exercise the option to withdraw in thirty days, and the business was conducted until December 31, 1920 as contemplated by the agreement.

The enterprise required no capital and none was ever invested by the partners. Bull's share of profits from January 1, 1920, to the date of his death, February 13, 1920, was $24,124.20; he had no other accumulated profits and no interest in any tangible property belonging to the firm. Profits accruing to the estate for the period from the decedent's death to the end of 1920 were $212,718.79; $200,117.90 being paid during the year, and $12,601.70 during the first two months of 1921.

The Court of Claims found:

"When filing an estate-tax return, the executor included the decedent's interest in the partnership at a value of $24,124.20,

which represented the decedent's share of the earnings accrued to the date of death, whereas the Commissioner, in 1921, valued such interest at $235,202.99, and subjected such increased value to the payment of an estate tax, which was paid in June and August 1921. The last-mentioned amount was made up of the amount of $24,124.20 plus the amount of $212,718.79, hereinbefore mentioned. The estate tax on this increased amount was $41,517.45,[1]

"April 14, 1921, plaintiff filed an income-tax return for the period February 13, 1920, to December 31, 1920, for the estate of the decedent, which return did not include, as income, the amount of $200,117.09 received as the share of the profits earned by the partnership during the period for which the return was filed. The estate employed the cash receipts and disbursement method of accounting.

"Thereafter, in July 1925 the Commissioner determined that the sum of $200,117.09 received in 1920 should have been returned by the executor as income to the estate for the period February 13 to December 31, 1920, and notified plaintiff of a deficiency in income tax due from the estate for that period of $261,212.65, which was due in part to the inclusion of that amount as taxable income and in part to adjustments not here in controversy. No deduction was allowed by the Commissioner from the amount of $200,117.09 on account of the value of the decedent's interest in the partnership at his death."

September 5, 1925 the executor appealed to the Board of Tax Appeals from the deficiency of income tax so determined. The Board sustained the Commissoner's action in including the item of $200,117.99 without any reduction on account of the value of the decedent's interest in the partnership at the date of death,[2] and determined a deficiency of $55,166.49, which, with interest of $7,510.95, was paid April 14, 1928.

July 11, 1928, the executor filed a claim for refund of this amount, setting forth that the $200,117.99, by reason of which the additional tax was assessed and paid, was corpus; that it was so originally determined by the Commissioner and the estate tax assessed thereon was paid by the executor; and that the subsequent assessment of an income tax against the estate for the receipt of the same sum was erroneous. The claim was rejected May 8, 1929. September 16, 1930, the executor brought suit in the Court of Claims, and in his petition, after setting forth the facts as he al-

[1] It will be noted there is an error in the figures set out in this finding, the total of the two smaller sums being $236,842.99, but the discrepancy is not material to any issue in the case.

[2] 7 B. T. A. 993.

leged them to be, prayed judgment in the alternative (1) for the principal sum of $62,677.44, the amount paid April 14, 1928, as a deficiency of income tax unlawfully assessed and collected, or (2) for the sum of $47,643.44 on the theory that if the sum of $200,117.99 was income for the year 1920 and taxable as such, the United States should have credited against the income tax attributable to the receipt of this sum the overpayment of estate tax resulting from including the amount in the taxable estate,—$34,035,[3] with interest thereon.

The Court of Claims held that the item was income and properly so taxed. With respect to the alternative relief sought it said: "We cannot consider whether the Commissioner correctly included the total amount received from the business in the net estate of the decedent subject to the estate tax for the reason that the suit was not timely instituted." Judgment went for the United States.[4] Because of the novelty and importance of the question presented we granted certiorari.[5]

1. We concur in the view of the Court of Claims that the amount received from the partnership as profits earned prior to Bull's death was income earned by him in his lifetime and taxable to him as such; and that it was also corpus of his estate and as such to be included in his gross estate for computation of estate tax. We also agree that the sums paid his estate as profits earned after his death were not corpus, but income received by his executor and to be reckoned in computing income tax for the years 1920 and 1921. Where the effect of the contract is that the deceased partner's estate shall leave his interest in the business and the surviving partners shall acquire it by payments to the estate, the transaction is a sale, and payments made to the estate are for the account of the survivors. It results that the surviving partners are taxable upon firm profits and the estate is not.[6] Here, however, the survivors have purchased nothing belonging to the decedent, who had made no investment in the business and owned no tangible property connected with it. The portion of the profits paid his estate was, therefore, income and not corpus; and this is so whether

[3] As appears from the quoted finding, the Court of Claims found the overpayment was $41,517.45.

[4] 6 F. Supp. 141.

[5] 294 U. S. —.

[6] *Hill* v. *Commissioner*, 38 F. (2d) 165; *Pope* v. *Commissioner*, 39 F. (2d) 420.

we consider the executor a member of the old firm for the remainder of the year, or hold that the estate became a partner in a new association formed upon the decedent's demise.

2. A serious and difficult issue is raised by the claim that the same receipt has been made the basis of both income and estate tax, although the item cannot in the circumstances be both income and corpus; and that the alternative prayer of the petition required the court to render a judgment which would redress the illegality and injustice resulting from the erroneous inclusion of the sum in the gross estate for estate tax. The respondent presents two arguments in opposition, one addressed to the merits and the other to the bar of the statute of limitations.

On the merits it is insisted that the Government was entitled to both estate tax and income tax in virtue of the right conferred on the estate by the partnership agreement and the fruits of it. The position is that as the contract gave Bull a valuable right which passed to his estate at his death the Commissioner correctly included it for estate tax. And the propriety of treating the share of profits paid to the estate as income is said to be equally clear. The same sum of money in different aspects may be the basis of both forms of tax. An example is found in this estate. The decedent's share of profits accrued to the date of his death was $24,124.20. This was income to him in his lifetime and his executor was bound to return it as such. But the sum was paid to the executor by the surviving partners, and thus became an asset of the estate; accordingly the petitioner returned that amount as part of the gross estate for computation of estate tax and the Commissioner properly treated it as such.

We are told that since the right to profits is distinct from the profits actually collected we cannot now say more than that perhaps the Commissioner put too high a value on the contract right when he valued it as equal to the amount of profits received—$212,718.99. This error, if error it was, the Government says is now beyond correction.

While, as we have said, the same sum may in different aspects be used for the computation of both an income and an estate tax, this fact will not here serve to justify the Commissioner's rulings. They were inconsistent. The identical money,—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other,—was the basis of two assessments. The

double taxation involved in this inconsistent treatment of that sum of money is made clear by the lower court's finding we have quoted. The Commissioner assessed estate tax on the total obtained by adding $24,124.20, the decedent's share of profits earned prior to his death, and $212,718.79, the estate's share of profits earned thereafter. He treated the two items as of like quality, considered them both as capital or corpus; and viewed neither as the measure of value of a right passing from the decedent at death. No other conclusion may be drawn from the finding of the Court of Claims.

In the light of the facts it would not have been permissible to place a value of $212,718.99 or any other value on the mere right of continuance of the partnership relation enuring to Bull's estate. Had he lived his share of profits would have been income. By the terms of the agreement his estate was to sustain precisely the same status quoad the firm as he had, in respect of profits and losses. Since the partners contributed no capital and owned no tangible property connected with the business, there is no justification for characterizing the right of a living partner to his share of earnings as part of his capital; and if the right was not capital to him, it could not be such to his estate. Let us suppose Bull had, while living, assigned his interest in the firm, with his partners' consent, to a third person for a valuable consideration, and in making return of income had valued or capitalized the right to profits which he had thus sold, had deducted such valuation from the consideration received, and returned the difference only as gain. We think the Commissioner would rightly have insisted that the entire amount received was income.

Since the firm was a personal service concern and no tangible property was involved in its transactions, if it had not been for the terms of the agreement, no accounting would have ever been made upon Bull's death for anything other than his share of profits accrued to the date of his death,—$24,124.20,—and this would have been the only amount to be included in his estate in connection with his membership in the firm. As respects the status after death the form of the stipulation is significant. The declaration is that the surviving partners "are to be at liberty" to continue the business for a year, in the same relation with the deceased partner's estate as if it were in fact the decedent himself still alive and a member of the firm. His personal representative

is given a veto which will prevent the continuance of the firm's business. The purpose may well have been to protect the good will of the enterprise in the interest of the survivors and to afford them a reasonable time in which to arrange for their future activities. But no sale of the decedent's interest or share in the good will can be spelled out. Indeed the Government strenuously asserted, in supporting the treatment of the payments to the estate as income, that the estate sold nothing to the surviving partners; and we agree. An analogous situation would be presented if Bull had not died, but the partnership had terminated by limitation on February 13, 1920, and the agreement had provided that, if Bull's partners so desired, the relation should continue for another year. It could not successfully be contended that, in such case, Bull's share of profit for the additional year was capital.

We think there was no estate tax due in respect of the $212,718.79 paid to the executor as profits for the period subsequent to the decedent's death.

The Government's second point is that if the use of profits accruing to the estate in computing estate tax was wrong, the statute of limitations bars correction of the error in the present action. So the Court of Claims thought. We hold otherwise.

The petitioner included in his estate tax return, as the value of Bull's interest in the partnership, only $24,124.20, the profit accrued prior to his death. The Commissioner added $212,718.79, the sum received as profits after Bull's death, and determined the total represented the value of the interest. The petitioner acquiesced and paid the tax assessed in full in August, 1921. He had no reason to assume the Commissioner would adjudge the $212,718.79 income and taxable as such. Nor was this done until July, 1925. The petitioner thereupon asserted, as we think correctly, that the item could not be both corpus and income of the estate. The Commissioner apparently held a contrary view. The petitioner appealed to the Board of Tax Appeals from the proposed deficiency of income tax. His appeal was dismissed April 9, 1928. It was then too late to file a claim for refund of overpayment of estate tax due to the error of inclusion in the estate of its share of firm profits.[7] Inability to obtain a refund or credit, or to sue the United States, did not, however, alter the fact that if

[7]Revenue Act of 1924, §§ 1012 and 281, 43 Stat. pp. 342 and 301; Revenue Act of 1926, §§ 1112 and 319, 44 Stat. pp. 115 and 84.

the Government should insist on payment of the full deficiency of income tax, it would be in possession of some $41,000 in excess of the sum to which it was justly entitled. Payment was demanded. The petitioner paid April 14, 1928, and on June 11, 1928, presented a claim for refund, in which he still insisted the amount in question was corpus, had been so determined and estate tax paid on that basis, and should not be classified for taxation as income. The claim was rejected May 8, 1929, and the present action instituted September 16, 1930.

The fact that the petitioner relied on the Commissioner's assessment for estate tax, and believed the inconsistent claim of deficiency of income tax was of no force, cannot avail to toll the statute of limitations, which forbade the bringing of any action in 1930 for refund of the estate tax payments made in 1921. As the income tax was properly collected, suit for the recovery of any part of the amount paid on that account was futile. Upon what theory, then, may the petitioner obtain redress in the present action for the unlawful retention of the money of the estate? Before an answer can be given, the system of enforcing the Government's claims for taxes must be considered in its relation to the problem.

A tax is an exaction by the sovereign, and necessarily the sovereign has an enforcible claim against every one within the taxable class for the amount lawfully due from him. The statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment. The assessment may be a valuation of property subject to taxation which valuation is to be multiplied by the statutory rate to ascertain the amount of tax. Or it may include the calculation and fix the amount of tax payable, and assessments of federal estate and income taxes are of this type. Once the tax is assessed the taxpayer will owe the sovereign the amount when the date fixed by law for payment arrives. Default in meeting the obligation calls for some procedure whereby payment can be enforced. The statute might remit the government to an action at law wherein the taxpayer could offer such defense as he had. A judgment against him might be collected by the levy of an execution. But taxes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sover-

eign has resorted to more drastic means of collection. The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.

In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified. Often an administrative hearing is afforded before the assessment becomes final; or administrative machinery is provided whereby an erroneous collection may be refunded; in some instances both administrative relief and redress by an action against the sovereign in one of its courts are permitted methods of restitution of excessive or illegal exaction. Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer. Nevertheless he may be without a remedy. But we think this is not true here.

In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress.

In July, 1925, the Government brought a new proceeding arising out of the same transaction involved in the earlier proceeding. This time, however, its claim was for income tax. The taxpayer opposed payment in full, by demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained. Had

the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party hold his money which has gone into its treasury by means of the fraud of their agent. *United States* v. *State Bank*, 96 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights. What was said in the *State Bank* case applies with equal force to this situation. "An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. . . . In these cases, [cited in the opinion] and many others that might be cited, the rules of law applicable to individuals were applied to the United States" (pp. 35, 36).[8] A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, as shown by the authority referred to, but may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. *United States* v. *Macdoniel*, 7 Pet. 1, 16, 17; *United States* v. *Ringgold*, 8 Pet. 150, 163-164. In the latter case this language was used: "No direct suit can be maintained against the United States. But when an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such a claim in a court of justice, and turn him round to an application to congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defence, to a suit by the United States."[9] If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the trans-

[8] See also *McKnight* v. *United States*, 98 U. S. 179, 186.
[9] See also *The Siren*, 7 Wall. 152, 154.

action upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.[10]

The circumstance that both claims, the one for estate tax and the other for income tax, were prosecuted to judgment and execution in summary form does not obscure the fact that in substance the proceedings were actions to collect debts alleged to be due the United States. It is immaterial that in the second case, owing to the summary nature of the remedy, the taxpayer was required to pay the tax and afterwards seek refundment. This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score.

To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax.

The pleading was sufficient to put in issue the right to recoupment. The Court of Claims is not bound by any special rules of pleading;[11] all that is required is that the petition shall contain a plain and concise statement of the facts relied on and give the United States reasonable notice of the matters it is called upon to meet.[12] And a prayer for alternative relief, based upon the facts set out in the petition may be the basis of the judgment rendered.[13]

We are of opinion that the petitioner was entitled to have credited against the deficiency of income tax, the amount of his overpayment of estate tax with interest and that he should have been given judgment accordingly. The judgment must be reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.

---

[10] *Williams* v. *Neely*, 134 Fed. 1; *Conner* v. *Smith*, 88 Ala. 300; *Stewart* v. *Simon*, 111 Ark. 358; *Beecher* v. *Baldwin*, 55 Conn. 419; *Blackshear* v. *Dekle*, 120 Ga. 766; *Aultman* v. *Torrey*, 55 Minn. 492; *Kaup* v. *Schinstock*, 88 Neb. 95; *Campbell* v. *Hughes*, 73 Hun (N. Y.) 14.

[11] *United States* v. *Burns*, 12 Wall. 246, 254; *District of Columbia* v. *Barnes*, 197 U. S. 146, 153-154.

[12] *Merritt* v. *United States*, 267 U. S. 338, 341.

[13] *United States* v. *Behan*, 110 U. S. 338, 347.